



**US Army Corps
of Engineers** ®
Kansas City District

Permit Application Number: 200101697

Applicant: Kansas Department of Transportation

Environmental Impact Statement: Titled, “*Final Environmental Impact Statement – Section 404 Permit Application – by – Kansas Department of Transportation – K-10 Highway (South Lawrence Trafficway)*,” prepared by the U.S. Army Corps of Engineers, Kansas City District, dated December 2002

RECORD OF DECISION

Kansas Highway 10 Relocation (South Lawrence Trafficway)

December 2003



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Kansas City District

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ABBREVIATIONS

ACHP – Advisory Council on Historic Preservation
BIA – Bureau of Indian Affairs
EIS – Environmental Impact Statement
EPA- Environmental Protection Agency
FEMA – Federal Emergency Management Administration
HAFP – Haskell Agricultural Farm Property
HERSC – Haskell Environmental Research Studies Center
HIHD – Haskell Institute Historic District
HINU – Haskell Indian Nations University
HNTB – HNTB, Inc. (Consulting Firm)
JAS – Jayhawk Audubon Society
K-10 HIGHWAY – Kansas Highway 10
KBS – Kansas Biological Survey
KCD – Corps of Engineers, Kansas City District
KCSC – Kansas Chapter of the Sierra Club
KDA – Kansas Department of Agriculture
KDOT – Kansas Department of Transportation
KEEPER – Keeper of the National Register of Historic Places
KWO – Kansas Water Office
MOA – Memorandum of Agreement
NAFWS – Native American Fish and Wildlife Society
NEPA – National Environmental Policy Act
NHL – National Historic Landmark
NHPA – National Historic Preservation Act
NNL – National Natural Landmark
NPS – National Park Service
ROD – Record of Decision
SHPO – State Historic Preservation Officer
TCP – Traditional Cultural Property
WGKCSC – Wakarusa Group Kansas Chapter of the Sierra Club
WPO – Wetlands Protection Organization



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1. Record of Decision. This document constitutes a Record of Decision (ROD) for a permit application under Section 404 of the Clean Water Act (33 USC 1344) and for a Final Environmental Impact Statement (Final EIS) for a proposal by the Kansas Department of Transportation (KDOT) to relocate Kansas Highway 10 (K-10 Highway) south of the city of Lawrence in Douglas County, Kansas. This document addresses the requirements contained in Section 404 of the Clean Water Act and the National Environmental Policy Act (NEPA) of 1969.

2. Permit Decision. I have reviewed and evaluated KDOT’s permit application, in light of the overall public interest, the environmental, social, engineering and economic considerations, and in accordance with applicable laws and regulations. It is my decision based on all available information, including a Final EIS, that issuance of a permit under authority of Section 404 of the Clean Water Act to authorize the applicant’s preferred alternative to relocate approximately six miles of K-10 Highway on a route identified as 32nd Street Alignment B is in compliance with Section 404(b)(1) Guidelines and is not contrary to the public interest. The Kansas City District’s authorization will contain special conditions and mitigation requirements to avoid, minimize and mitigate project-related impacts.

3. Project Information.

Note: Refer to the Final EIS for additional information.

3.1. Project Location. The project is located in and near the city of Lawrence in Douglas County, Kansas.

3.2. Project Description. The project consists of construction of a new section of K-10

Highway beginning in Douglas County at a location on the existing K-10 Highway alignment near the eastern edge of the city of Lawrence and extending approximately six miles south and west to the existing K-10 Highway/US-59 Highway interchange in southwest Lawrence. The new road section will replace the existing K-10 Highway route through Lawrence with a direct, limited access, freeway connection along the southern edge of the city on an alignment identified as 32nd Street Alignment B.

3.3. Project Purpose and Need. The existing section of K-10 Highway (connecting link) within the city of Lawrence is located on city streets (23rd Street and Iowa/US-59 Highway) and is heavily congested due to high traffic volumes, poor access management, and insufficient capacity. Traffic congestion within the connecting link is expected to continue to worsen as travel demand within the K-10 Highway corridor increases. The deficiencies of the connecting link degrade the performance of the regional transportation system and contribute to unsafe, congested, and inefficient conditions for the regional system as well as on Lawrence city streets serving local traffic needs.

The *purpose and need* for the project is to provide a safe, efficient, environmentally sound, and cost-effective transportation facility for users of K-10 Highway and the surrounding state highway system and, to the extent possible, to alleviate congestion on Lawrence city streets.

4. Alternatives Considered. The No-Action alternative and five roadway corridors with a total of twelve reasonable build alternative alignments were evaluated and are discussed in the Draft and Final EIS. See **Exhibit 1** for a plan view of the five conceptual roadway corridors evaluated for this project.

Note: Refer to the Final EIS for additional information.

4.1. No-Action Alternative. The No-Action alternative assumes that K-10 Highway will not be relocated and that the connecting link through the city of Lawrence will remain essentially unchanged for the near future. This alternative will result in worsening traffic conditions on K-10 Highway and will continue to degrade the human environment due to increasing traffic congestion, high accident rates, noise, lost time, and other traffic-related deficiencies. The No-Action alternative does not satisfy Lawrence and Douglas County's local planning objectives, which include improvements to both local and regional transportation service and relief for congestion on 23rd Street. The No-Action alternative will encourage Lawrence and Douglas County to widen 31st Street between Haskell Avenue and Louisiana Street to accommodate an increasing volume of local traffic on 31st Street due to congestion and delays on the K-10 Highway connecting link. Increased traffic volumes on 31st Street will increase noise and visual disturbances on the Haskell Indian Nations University (HINU) campus and will increase noise in Baker Wetlands. The Kansas City District (KCD) has determined that the No-Action alternative will not satisfy KDOT's project purpose and need, and that it is not a preferred alternative.

4.2. 31st Street Alternative. A single alternative alignment was developed for a 31st Street corridor. The 31st Street alignment was determined to be a reasonable alternative and was presented in the Draft EIS for further evaluation. The alignment overlays a section of existing 31st Street routed through the HINU campus. The 31st Street alternative is considered highly

desirable based on cost and efficiency. The alternative will satisfy KDOT's project purpose and need, and does not conflict with Lawrence and Douglas County's local planning objectives. The alignment will have minimal impact on the physical environment; however, it will significantly impact the human environment due to increased noise and visual disturbance within the HINU campus. Based primarily on anticipated impacts to HINU, KCD has determined that the 31st Street alignment is not a preferred alternative.

4.3. 32nd Street Alternative. Five alternative alignments (A through E) were developed for the 32nd Street corridor. The five alignments follow the same basic route but differ in the number of access points and modifications to the local road network. The five 32nd Street alignments were determined to be reasonable alternatives and were presented in the Draft EIS for further evaluation. The 32nd Street Alignment B alternative (see **Exhibit 2**) is KDOT's Preferred Alternative and is the alignment reflected in the agency's Section 404 permit application. The 32nd Street Alignment B alternative is one of the two Preferred Alternatives identified by KCD in the Draft EIS and is the Selected Alternative presented in the Final EIS.

The 32nd Street corridor is located south of the 31st Street corridor along most of its length. No 32nd Street roadway currently exists. The 32nd Street corridor does not cross HINU property but does cross Baker University property (Baker Wetlands) between Haskell Avenue and Louisiana Street. The 32nd Street Alignment B alternative is highly desirable based on an evaluation of foreseeable cumulative future impacts, cost, efficiency, and other factors discussed in the Final EIS. The alignment satisfies KDOT's project purpose and need, and does not conflict with Lawrence and Douglas County's local planning objectives. Although this alternative will result in substantially greater immediate wetland losses than many of the other alternatives considered, KCD has determined that, on balance, the 32nd Street Alignment B alternative best satisfies the overall public interest in this matter and that it is the least environmentally damaging practicable alternative available to KDOT.

4.4. 35th Street Alternative. Two alternative alignments (A and B) were developed for the 35th Street corridor. The two alignments follow slightly different routes, which are offset by approximately 700 feet. The two 35th Street alignments were determined to be reasonable alternatives and were presented in the Draft EIS for further evaluation. The 35th Street corridor is located south of the 32nd Street corridor along most of its length, on an alignment near an existing 35th Street roadway. The 35th Street corridor bisects Baker University property (Baker Wetlands) between Haskell Avenue and Louisiana Street.

The 35th Street corridor will satisfy KDOT's project purpose and need. However, the corridor's bisection of Baker Wetlands will result in significant impacts to the area's ecology and will substantially degrade the visual quality of the wetland complex. In addition, the 35th Street corridor has the highest potential, among the five alternative corridors considered, to impact the Wakarusa River's floodplain. Based on the 35th Street corridor's high potential to significantly impact environmental values that can be avoided, minimized and more readily mitigated through selection of other less environmentally damaging alternatives with similar operational characteristics, KCD has determined that alignments within the 35th Street corridor are not preferred alternatives.

4.5. 38th Street Alternative. Two alternative alignments (A and B) were developed for the 38th Street corridor. The two alignments follow the same basic route but differ in the number of access points and modifications to the local road network. The two 38th Street alignments were determined to be reasonable alternatives and were presented in the Draft EIS for further evaluation. The 38th Street corridor is located south of the 35th Street corridor along most of its length. No current 38th Street roadway exists. The 38th Street corridor crosses Baker University property (Baker Wetlands) immediately north of the Wakarusa River between Haskell Avenue and Louisiana Street.

The 38th Street corridor will satisfy KDOT's project purpose and need. However, the corridor will create a barrier between the Wakarusa River and the majority of the Baker Wetlands complex. A physical barrier between the river and Baker Wetlands will have a high potential to significantly impact the area's ecology and is expected to substantially impact terrestrial wildlife species that travel between the river's riparian corridor and Baker Wetlands. In addition, the 38th Street corridor has a potential to impact any unmarked Native American burials that may be present in the narrow forested fringe located along the north bank of the Wakarusa River. Based on the 38th Street corridor's high potential to significantly impact environmental values that can be avoided, minimized and more readily mitigated through selection of other less environmentally damaging alternatives with similar operational characteristics, and based on the potential for alignments within the corridor to impact any unmarked burials that may be present in the forested fringe along the Wakarusa River, KCD has determined that alignments within the 38th Street corridor are not preferred alternatives.

4.6. 42nd Street Alternative. Two alternative alignments (A and B) were developed for the 42nd Street corridor. The two alignments follow the same route east of Haskell Avenue but different routes between Haskell Avenue and US-59 Highway. The two 42nd Street alignments were determined to be reasonable alternatives and were presented in the Draft EIS for further evaluation. The 42nd Street Alignment A alternative (see **Exhibit 3**) is one of the two Preferred Alternatives identified by KCD in the Draft EIS.

The 42nd Street corridor is located south of the Wakarusa River along part of its length. Both of the 42nd Street alignments cross the Wakarusa River east of Haskell Avenue and west of Louisiana Street and do not cross Baker Wetlands. No 42nd Street roadway currently exists. The alignments satisfy KDOT's project purpose and need; however, they conflict with the city of Lawrence and Douglas County's local planning objectives. Based on an evaluation of all of the potential impacts identified by KCD including foreseeable cumulative future impacts, KCD has determined that none of the alignments within the 42nd Street corridor represent the least environmentally damaging practicable alternative available to KDOT, and that selection of an alignment within the corridor would be contrary to the public interest.

5. Evaluation of the Two Preferred Alternatives and the Final Selection.

5.1. Evaluation Criteria. The KCD's evaluation of the two Preferred Alternatives considered a broad range of potential impacts and operational characteristics. After a thorough review of all important factors, KCD identified six key evaluation criteria and intensified its focus on those areas. The six criteria include roadway safety, efficiency, cost, land use, direct

wetland impacts, and cultural/historic property impacts. The KCD's comparison of the two Preferred Alternatives for the six key criteria (see **Volume 1, Section 2.8 of the Final EIS**) resulted in a finding that on balance the 32nd Street alignment ranked higher (more desirable) than the 42nd Street alignment.

A comparison of the six key evaluation criteria is presented below:

- **Roadway Safety.** The 32nd Street alignment provides a higher level of traveler safety than the 42nd Street alignment due to a greater reduction of congestion on the existing K-10 Highway connecting link through Lawrence and due to the shorter length of the route.
- **Efficiency.** The 32nd Street alignment provides a higher level of efficiency than the 42nd Street alignment due to the greater volume of traffic that will use the route and due to the shorter length of the route.
- **Cost.** The 32nd Street alignment is substantially less costly than the 42nd Street alignment.
- **Land Use.** The 32nd Street alignment is compatible with Lawrence and Douglas County's existing and planned land use. The 42nd Street alignment is not compatible with Lawrence and Douglas County's existing or planned land use.
- **Direct Wetland Impacts.** The 42nd Street alignment will result in substantially fewer direct wetland losses than the 32nd Street alignment.
- **Cultural and Historic Property Impacts.** The 42nd Street alignment will result in less direct impacts to cultural and historic properties than the 32nd Street alignment.

5.2. Cumulative Impacts Assessment. The KCD's evaluation of the two Preferred Alternatives resulted in a finding that among the impacts identified, reasonably foreseeable cumulative future impacts associated with the 42nd Street alignment would be significant. The KCD addressed reasonably foreseeable cumulative future impacts in the Final EIS in accordance with NEPA requirements and Council on Environmental Quality guidance, and concluded that such impacts are an important consideration in the selection of a roadway alignment that will best satisfy the overall public interest in this matter.

Note: The NEPA implementing regulations (40 CFR Parts 1500 – 1508) require the scope of an EIS to include “cumulative actions” and to address “indirect effects” and their significance. *40 CFR Part 1508.7* defines “cumulative impacts” as those impacts on the environment, which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. *40 CFR Part 1507* states that cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. *40 CFR Part 1508.8* defines “indirect effects” as those effects caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. *40 CFR Part 1508* states that indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. The Council on Environmental Quality's Fifth Annual Report, 410-11, December 1974, states that secondary and induced effects must be

considered and may be more significant than the project's primary effects.

A Selection Matrix, which compares the two Preferred Alternatives (see **Table 1**) is presented in the Final EIS (Volume 1, Table 2.20) to sharply define many of the project-related impacts identified by KCD during its evaluation. The Selection Matrix compares twenty important categories of project-related impacts based on “existing” and “future” conditions. The “existing condition” is a condition that does not consider cumulative impacts associated with local foreseeable future development, where as the “future condition” considers cumulative impacts associated with local foreseeable future development through the year 2025. Foreseeable future development can reasonably be expected to include construction of residential dwellings and/or businesses on undeveloped properties located north and south of the Wakarusa River in the vicinity of Baker Wetlands. In addition, foreseeable future development is expected to increase traffic on 31st Street, Haskell Avenue and Louisiana Street, which is likely to result in expansion of one or more of these roads from two lanes to four lanes. Such development will diminish or eliminate the rural character of the properties south of 31st Street by converting undeveloped land to an urban environment. Urbanization of the area and the associated increases in traffic will result in substantially more noise, light, urban debris, and visual disturbances within the area surrounding Baker Wetlands, which includes the HINU campus.

A comparison of the two Preferred Alternatives for the twenty project-related impacts presented in the Selection Matrix resulted in a finding that on balance the 32nd Street alignment ranked higher (more desirable) than the 42nd Street alignment. The KCD determined that the magnitude of the reasonably foreseeable cumulative future impacts that will occur to Baker Wetlands in association with the 42nd Street alignment is significant and is an important factor in the selection of a route that will best satisfy the overall public interest in this matter.

COMPARISON OF PREFERRED ALTERNATIVES

IMPACT CATEGORY	32nd STREET B	42nd STREET A
Wetlands: Direct Losses (Cumulative total for all wetland losses)	Approximately 57.6 acres of wetlands will be lost (total includes 32nd street, relocation of 31st Street to Baker Wetlands, and construction of a hike and bike trail along 32nd Street).	4.45 acres
Wetlands: Mitigation (Cumulative total for all wetlands created)	Approximately 317 acres of wetlands will be created (approximately 13 acres on the vacated 31st Street alignment and approximately 304 acres on properties located east of Haskell Avenue and west of Louisiana Street with a net increase of approximately 259 acres.	Approximately 80 acres of wetlands will be created with a net increase of approximately 76 acres.

IMPACT CATEGORY	32nd STREET B	42nd STREET A
Noise: <i>Existing Condition</i> (Baker Wetlands and HINU)	With mitigation - No appreciable increase expected in Baker Wetlands or on HINU property over the existing condition.	No appreciable increase expected in Baker Wetlands or on HINU property over the existing condition.
Noise: <i>Future Condition</i> (Baker Wetlands and HINU)	With mitigation - Less noise in Baker Wetlands and on HINU property than with 42nd Street.	More noise in Baker Wetlands and on HINU property than 32nd Street with mitigation.
Light: <i>Existing Condition</i> (Baker Wetlands and HINU)	With mitigation - No appreciable increase expected in Baker Wetlands or on HINU property over the existing condition.	No appreciable increase expected in Baker Wetlands or on HINU property over the existing condition.
Light: <i>Future Condition</i> (Baker Wetlands and HINU)	With mitigation - Less light in Baker Wetlands and on HINU property than with 42nd Street.	Foreseeable cumulative future impacts will result in more light in Baker Wetlands and on HINU property than with 32nd Street with mitigation.
Native American Religious/Spiritual Interests: <i>Existing and Future Condition</i> (Baker Wetlands and HINU)	With mitigation - Perceived as negative impact to Native American interests.	Perceived as neutral impact to Native American interests.
HINU: <i>Existing Condition</i>	With mitigation - No direct impacts to the property. Removal of 31st Street from the property. No impact to the Medicine Wheel or sweat lodges.	No direct impacts to the property. 31st Street will not be removed. No impact to the Medicine Wheel or sweat lodges.
HINU: <i>Future Condition</i>	With mitigation - No direct impacts to the property. Removal of 31st Street from the property. No impact to the Medicine Wheel or sweat lodges. Foreseeable cumulative future impacts to HINU will be less than with 42nd Street.	No direct impacts to the property. 31st Street will not be removed. Potential noise and light impacts to the Medicine Wheel and sweat lodges. Foreseeable cumulative future impacts to HINU will be greater than with 32nd Street.
Baker Wetlands: <i>Existing Condition</i>	With mitigation - Loss of approximately 52.6 acres of wetlands. Creation of approximately 304 acres of wetlands with a net increase of approximately 251 acres.	No direct impacts to Baker Wetlands.
Baker Wetlands: <i>Future Condition</i>	With mitigation - Loss of approximately 52.6 acres of wetlands. Creation of approximately 304 acres of wetlands with a net increase of approximately 251 acres. Foreseeable cumulative future impacts to Baker Wetlands are substantially less than with 42nd Street.	No direct impacts to Baker Wetlands. Foreseeable cumulative future impacts to Baker Wetlands are substantially greater than with 32nd Street.
Haskell Institute National Historic Landmark: <i>Existing and Future Condition</i>	With mitigation - No impact. (Section 106 - No effect.)	No impact. (Section 106 - No effect.)

IMPACT CATEGORY	32nd STREET B	42nd STREET A
Haskell Agricultural Farm Property (A National Register Eligible Historic Property): <i>Existing Condition</i>	With mitigation - Direct adverse impacts to the historic property. (Section 106 - Resolution of adverse effects anticipated through mitigation).	No direct impacts to the historic property (Section 106 - No effect anticipated).
Haskell Agricultural Farm Property (A National Register Eligible Historic Property): <i>Future Condition</i>	With mitigation - Direct adverse impacts to the historic property. (Section 106 - Resolution of adverse effects anticipated through mitigation). Foreseeable cumulative future impacts are substantially less than with 42nd Street.	No direct impacts to the historic property. (Section 106 - No effect anticipated). Foreseeable cumulative future impacts are substantially greater than 32nd Street with mitigation.
Other National Register Eligible Properties: <i>Existing and Future Condition</i>	H. Eggert Family Property. No impact. (Section 106 - No effect).	William Meairs Farmstead. Potential adverse impact. (Section 106 - Determination of adverse effect anticipated; resolution of adverse effect anticipated through mitigation).
Baker Wetlands National Natural Landmark: <i>Existing Condition</i>	With mitigation - Direct adverse impacts to the Natural Landmark. Mitigation will substantially reduce noise, light, and visual impacts associated with the bypass.	No direct impacts to the Natural Landmark.
Baker Wetlands National Natural Landmark: <i>Future Condition</i>	With mitigation - Direct adverse impacts to the Natural Landmark. Mitigation will substantially reduce noise, light, and visual impacts associated with the bypass. Foreseeable cumulative future impacts are substantially less than with 42nd Street.	No direct impacts to the Natural Landmark. Foreseeable cumulative future impacts are substantially greater than 32nd Street with mitigation.
Development south of the Wakarusa River:	32 nd Street is a neutral condition for development in areas south of the Wakarusa River. The alignment neither promotes nor discourages such development.	42 nd Street will promote development along its corridor south of the Wakarusa River.
Wakarusa River and its riparian corridor:	32nd Street will not pass over the Wakarusa River or through its riparian corridor.	42 nd Street will pass over the Wakarusa River and through its riparian corridor at two locations. The alignment will have a significantly greater impact on the river and its riparian corridor than 32nd Street.

(Table 1)

Foreseeable cumulative future impacts associated with the two Preferred Alternatives are discussed below:

- **32nd Street Alignment B Alternative.** The foreseeable cumulative future impacts associated with the 32nd Street alignment will not approach the magnitude of such impacts associated with the 42nd Street alignment, and will not be significant. The 32nd Street alignment is not likely to substantially stimulate development south of the Wakarusa River, nor is it likely to affect traffic volumes south of the highway bypass on Haskell Avenue and Louisiana Street at a magnitude approaching that for the 42nd Street alignment.

The 32nd Street alignment may stimulate development north of the Wakarusa River; however, mitigation associated with the alignment substantially reduces the potential for such development to adversely impact Baker Wetlands. Mitigation developed for the 32nd Street alignment will compensate for wetland losses at a ratio of approximately 6 acres created for each acre impacted and will provide an approximately 304 acre wetland buffer that will create a permanent barrier to development along the east and west boundaries of Baker Wetlands. No alignment within the other roadway corridors evaluated by KCD provides the long-term protection and benefits to Baker Wetlands that are afforded by selection of the 32nd Street Alignment B alternative with its mitigation plan (see a discussion of mitigation in Section 6 below). Dr. Roger Boyd of Baker University manages Baker Wetlands and is an authority on the ecology of the wetland complex. Dr. Boyd participated in the design of the mitigation plan and supports selection of the 32nd Street alignment (see **Appendix I, Section F, Item 2** for comments presented by Dr. Boyd concerning his position in this matter). Dr. Boyd has stated that he is confident that mitigation efforts will succeed and that the mitigation plan will substantially increase the size of the Baker Wetlands, will be best for the long-range vision of Baker Wetlands, and will enhance the University's ability to teach future generations the value of wetlands.

- **42nd Street Alignment A Alternative.** Foreseeable cumulative future impacts associated with the 42nd Street alignment are expected to be significant. The KCD has evaluated local land use planning and projections including current discussions by Douglas County and the city of Lawrence to extend the urban growth area into the rural landscape located south of the Wakarusa River, current local development patterns such as the rapid development that has occurred along the completed western leg of the bypass, and general growth trends related to highway construction in or near other communities. The KCD's evaluation has resulted in a determination that reasonably foreseeable cumulative future impacts associated with the 42nd Street alignment are likely to result in isolation and encapsulation of Baker Wetlands in an area saturated by urban development. The KCD has further determined that encapsulation of Baker Wetlands in an urbanized setting is likely to result in substantial wetland losses and degradation of the long-term vitality of the wetland complex and its serene environmental setting.

The 42nd Street alignment crosses the Wakarusa River at two locations and is partially routed south of the river beginning at a location approximately 1¾ miles east of Haskell

Avenue and ending at a location immediately west of Louisiana Street. The alignment will accelerate development and urbanization of the primarily rural area south of the Wakarusa River and the undeveloped agricultural properties adjacent to Baker Wetlands on the north side of the river. *It should be noted that KCD has determined that all 42nd Street alignments will result in similar foreseeable cumulative future impacts due to their influence on development south of the Wakarusa River and the undeveloped area between 31st Street and the river.*

The 42nd Street alignment includes construction of an interchange south of the Wakarusa River at Haskell Avenue to provide the Lawrence community with access to the new section of highway. The Haskell Avenue/K-10 Highway interchange will convert Haskell Avenue, which borders the east side of Baker Wetlands, into a mainline north-south connecting road between the Lawrence metropolitan area and the highway. Increased traffic demand on Haskell Avenue can reasonably be expected to require significant improvements to the road, which could include wider lanes and shoulders for a two-lane road, or expansion from two lanes to four lanes. Development south of the river will also increase traffic on Louisiana Street, which borders the west side of Baker Wetlands. Louisiana Street, like Haskell Avenue, will become an important north-south road linking properties south of the Wakarusa River with the Lawrence metropolitan area. Increased traffic demand on Louisiana Street can also reasonably be expected to require improvements to the road. The 42nd Street alignment is not expected to alleviate increasing local traffic demand on 31st Street, which is located immediately adjacent to the north property line of Baker Wetlands. An increasing traffic load on 31st Street can reasonably be expected to necessitate significant improvements to the road, which could include wider lanes and shoulders for a two-lane road, or expansion from two lanes to four lanes. Construction-related improvements to Haskell Avenue, Louisiana Street and/or 31st Street, to accommodate increased traffic demand associated with the 42nd Street alignment, are likely to cause direct and indirect wetland losses in Baker Wetlands and on other properties located adjacent to Baker Wetlands. Wetlands border most of the north and south sides of 31st Street between Haskell Avenue and Louisiana Street. Wetlands also border the west side of Haskell Avenue and much of the east side of the road. In addition, wetlands border the east side of Louisiana Street and are likely to be present as farmed wetlands along the west side of the road. The 42nd Street alignment can also reasonably be expected to accelerate development within agricultural areas adjacent to Baker Wetlands east of Haskell Avenue and west of Louisiana Street. Such development is likely to include construction of residential and/or commercial properties and will further increase traffic on local roads bordering Baker Wetlands.

Foreseeable cumulative future impacts associated with the 42nd Street alignment are likely to include:

- 1) Significant degradation of wetland values and the serene environmental setting in and near Baker Wetlands due to increased traffic bordering three sides of the wetland. Such impacts are likely to include traffic generated noise, light, debris, and visual disturbances.
- 2) Significant degradation of wetland values and the serene environmental setting in and near Baker Wetlands due to development and urbanization of adjacent agricultural properties. Impacts are likely to include loss of the areas rural character; significant

increases in light from streetlights homes and/or businesses; significant increases in noise generated from residential areas and/or businesses and the related traffic; and visual intrusion resulting from construction of residential and/or commercial structures, street lights, and other urban development.

3) Direct wetland losses resulting from local roadway improvements. (The total acreage of direct wetland losses cannot be predicted since such losses will depend upon the number of roads improved and the type of improvements required.)

The 32nd Street Alignment B alternative was identified by KCD as the Selected Alternative for this project based on KCD's findings that it is the least environmentally damaging practicable alternative available to KDOT that meets the project's purpose and need. The KCD's final determination was based on consideration of all of the information collected by KCD during development of the EIS for this project. As stated above, KCD's evaluation of the two Preferred Alternatives resulted in a determination that project-related impacts associated with the Preferred Alternatives are significantly greater for the 42nd Street alignment than for the 32nd Street alignment.

Note: The Environmental Protection Agency (EPA) is responsible for reviewing and commenting in writing on the environmental impact of major Federal actions under Section 309 of the Clean Air Act. If EPA's Administrator determines that the action is unsatisfactory from the standpoint of public health or welfare or environmental quality, he/she shall publish the determination and the matter shall be referred to the Council on Environmental Quality. The EPA has provided KCD with written comments in response to the Final EIS in accordance with their policies and procedures (see Appendix I, Section A, Item 1). The EPA has concluded that it is apparent that the reasonably expected future conditions and cumulative effects of multiple planned actions within the project area argue in favor of the Selected Alternative. The EPA has further concluded that the assumptions that underpin the argument for selection of the 32nd Street alignment are credible and are consistent with both the Clean Water Act Section 404(b)(1) Guidelines and NEPA implementing regulations.

6. Mitigation Requirements. Mitigation requirements for the Selected Alternative consist of a broad range of stipulations intended to compensate for project-related impacts to the human environment (See **Exhibit 4** for plan views and a cross section of mitigation features). The mitigation plan for this project includes conditions developed to address physical, cultural and aesthetic impacts, and a Memorandum of Agreement (MOA) that is narrowly focused on conditions to resolve adverse effects to historic properties (see **Section 10.3** below for the conditions incorporated into the Final MOA).

Mitigation for the Selected Alternative includes: 1) creation of approximately 317 acres of wetlands (approximately 304 acres of wetlands will be created on agricultural land located immediately east and west of Baker Wetlands and 13 acres will be created on the HINU campus); 2) relocation of 31st Street from the HINU campus to Baker Wetlands; 3) removal of the 31st Street roadbed (approximately 13 acres of wetlands will be created on the vacated roadbed); 4) return of the 31st Street construction easement to the Bureau of Indian Affairs (BIA)/HINU; 5) construction of hike and bike trails in Baker Wetlands; 6) construction of safe

pedestrian access to Baker Wetlands from locations north of the new roadway corridor; 7) construction of camp sites and additional parking areas in and near Baker Wetlands; 8) construction of noise walls along both sides of the section of highway corridor passing through Baker Wetlands; 9) vegetative plantings to screen noise walls from the viewshed within Baker Wetlands; 10) relocation of Haskell Avenue eastward and Louisiana Street westward and removal of the vacated roadbeds to create an approximately 304 acre wetland buffer along the east and west property lines of Baker Wetlands; 11) construction of a Wetland and Cultural Educational Center; 12) creation of an endowment to ensure long-term financial support for management of Baker Wetlands; 13) limited and unobtrusive street lighting along that section of the roadway corridor located in Baker Wetlands, if lighting is required for traveler safety; 14) construction of drainage features within the roadway corridor to prevent roadway runoff from entering Baker Wetlands; and 15) other miscellaneous features to mitigate project-related impacts. Mitigation also includes specific conditions developed and incorporated into a MOA to resolve adverse effects to the Haskell Agricultural Farm Property (HAFP).

All of the mitigation features described above, including the MOA, will be incorporated into the special conditions of the Section 404 permit KCD intends to issue to authorize construction of the highway bypass. The approximately 304 acres of mitigation wetlands that will be created east of Haskell Avenue and west of Louisiana Street will be protected from disturbance in perpetuity. Removal of 31st Street, its roadbed, and the creation of 13 acres of wetlands on HINU property will be subject to approval by the BIA/HINU. If the BIA/HINU do not wish to have the road removed or to create wetlands on the vacated easement, no action will be taken other than to relinquish the roadway easement to the BIA/HINU. Wetlands constructed on HINU property will not be subject to conditions requiring preservation in perpetuity since KDOT does not control the property. However, such wetlands will be subject to regulation under Section 404 of the Clean Water Act.

Note: Mitigation associated with the 42nd Street Alignment A alternative included the creation of approximately 80 acres of wetlands. The mitigation site consisted of an 80-acre tract of land under KDOT ownership west of Louisiana Street (the tract is located within the mitigation area identified for the 32nd Street alignment). Mitigation for the 42nd Street alignment would likely have included development of a MOA to resolve adverse effects to historic properties. Mitigation would also have included other miscellaneous features that have not been addressed in detail due to the conceptual nature of the proposal. Mitigation for the 42nd Street alignment would not have been of sufficient magnitude to significantly reduce the foreseeable cumulative future impacts associated with the route.

7. Public Involvement.

Note: Refer to the Final EIS for additional information.

7.1. Draft Environmental Impact Statement. A Notice of Intent to prepare a Draft EIS was published in the Federal Register on August 7, 2001. A Public Scoping Meeting was held on August 30, 2001, and an Agency Scoping Meeting was held on October 11, 2001, to identify significant issues related to the proposed action and to determine the scope of issues to be addressed in the EIS. The Draft EIS was released to the public for review and comment on

August 9, 2002. A Notice of Availability of the Draft document was published in the Federal Register on August 16, 2002, which initiated a formal 45-day public comment period beginning on that date and ending on September 30, 2002.

7.2. Public Notice. A Joint Public Notice was issued by KCD and the Kansas Department of Health and Environment on August 16, 2002 (concurrent with the Notice of Availability for the Draft EIS) to initiate a public interest review for KDOT's Section 404 permit application. The Joint Public Notice comment period remained open for 30 days and closed on September 15, 2002. Comments received in response to the Joint Public Notice were combined with comments addressing the proposed Draft EIS and are addressed in the Draft document.

7.3. Public Hearing. The KCD conducted a public hearing on September 12, 2002, in the city of Lawrence, Kansas to solicit comments related to the Draft EIS.

7.4. Final Environmental Impact Statement. A Final EIS was released to the Public for review and comment on January 6, 2003. A Notice of Availability for the final document was published in the Federal Register on January 17, 2003, which initiated a formal 30-day public comment period beginning on that date and ending on February 17, 2003. In response to several requests, the comment period for the Final EIS was extended two weeks and ultimately closed on March 3, 2003.

Some of the initial copies of Volume 1 of the Final EIS contained errors. Chapter 5 and the Summary were both misprinted and were missing pages. Chapter 5 was reprinted in its entirety and was mailed on or about January 10, 2003, to all parties that received a defective copy. The Summary was also reprinted in its entirety and was mailed on or about January 20, 2003, to all parties that received a defective copy. No additional errors have been identified in the Final document.

7.5. Agency and Public Comments. Refer to **Appendix I, Sections A through F, of this ROD** for copies of comment letters received from agencies, organizations, and individuals after completion of the Final EIS. Refer to **Section 1 in Enclosure 1 to this ROD** for KCD's evaluation of the public and agency comments contained in Appendix I.

8. Consultation With Tribal Governments. As stated in the Draft and Final EIS, KCD initiated consultation with all Federally-recognized Indian tribes (approximately 576 tribes). In addition, KCD invited 29 of the tribes (Kansas homeland and reservation tribes) to enter into government-to-government consultation. Ten of the twenty-nine homeland and reservation tribes met with KCD on a government-to-government basis. Government-to-government meetings were held with the Iowa Tribe of Kansas and Nebraska on April 26, 2002; the Kickapoo Tribe in Kansas on April 26 and May 29, 2002; the Northern Cheyenne Tribe on July 22, 2002; the Omaha Tribe of Nebraska on April 25, 2002; the Osage Tribe on May 16, 2002; the Prairie Band Potawatomi Nation on April 26, 2002 and October 1, 2003; the Rosebud Sioux Tribe on January 30, 2003; the Sac and Fox Nation of Missouri on May 29, 2002; and the Winnebago Tribe of Nebraska on June 24, 2002. Two of the twenty-nine homeland and reservation tribes stated that they wished to meet with KCD but did not follow through with arrangements for a meeting. Ten of the tribes declined KCD's offer to meet, five tribes were

noncommittal, and four tribes did not respond to KCD's inquiries regarding initiation of government-to-government consultation.

Note: Refer to Appendix I, Section G, of this ROD for copies of comment letters received from tribal governments after completion of the Final EIS, and KCD's written responses to tribal governments. Refer to Section 2.1 in Enclosure 1 to this ROD for KCD's evaluation of the tribal government comments contained in Appendix I.

9. Tribal Elders. During preparation of the EIS for this project several tribes and other interested parties requested that KCD meet with tribal elders to collect information regarding the history of the Haskell school and to obtain the elders views regarding the project's potential to impact the site of the former Haskell Institute. The KCD informed all parties requesting such meetings that KCD was interested in meeting with tribal elders. Early in the spring of 2002, KCD became concerned that no tribe or other interested party had come forward to help KCD coordinate a meeting with tribal elders. The KCD then initiated requests for assistance from various tribes, tribal members, and other interested parties to set up meetings with any elders interested in discussing this project. Various attempts were made by KCD to pursue offers to meet; however, early efforts to establish a meeting were not successful.

On December 18, 2002, the Prairie Band Potawatomi Nation provided KCD with five videos containing interviews with tribal elders. The interviews addressed the views and experiences of the elders related to the Haskell school and, in some cases, the potential impact of the roadway project on the site of the former Haskell Institute. Col. Curtis, the Corps of Engineers Kansas City District Engineer, viewed all of the videos in their entirety.

The first meeting between KCD and a tribal elder took place on January 27, 2003. Col. Curtis and Dr. Elm, an Onadaga tribal elder, toured the site of the former Haskell Institute. A second meeting was held with tribal elders on January 30, 2003, on the Rosebud Sioux reservation. Col. Curtis met with members of the Rosebud Sioux's tribal council and two tribal elders - Mr. Sherman Wright and Ms. Christine Dunham.

The primary views expressed by elders include the value of the Haskell school to the Native American community and the need to ensure that the site remains available to students and others for religious/spiritual use and as a connection to the past. Several elders expressed concern that the project would disrupt the serenity and spirituality of the property, and that the road would cutoff access to the property from HINU.

The information presented by tribal elders has been carefully considered by KCD. The bypass will be located off of the current HINU campus and will be sited in Baker Wetlands several hundred feet south of the existing 31st Street. The 31st Street roadway will be removed, which will result in no net increase in roadway corridors through the property. Noise walls will be constructed to limit audible and visual disturbances and two pedestrian paths will be constructed to provide safe access to Baker Wetlands (former Haskell Institute property) from the HINU campus and other areas north of the roadway corridor. The KCD has concluded that the project is unlikely to significantly impact religious/spiritual use of the property by Native Americans and that the property's value to Native Americans, as a reminder of the past, will not be

substantially degraded.

Note: Refer to Appendix I, Section H, of this ROD for copies of comment letters received from tribal elders after completion of the Final EIS, and correspondence between KCD and tribal governments concerning meetings with tribal elders. Refer to Section 2.2 in Enclosure 1 to this ROD for KCD's evaluation of the comments received from tribal elders and from tribal governments concerning meetings with the elders.

10. Historic Properties (Section 106 of the National Historic Preservation Act).

10.1. Eligibility Determination (Correction to Information Presented in the Final EIS).

The Final EIS states that the Keeper of the National Register of Historic Places (Keeper) concurred with determinations made by KCD and the State Historic Preservation Officer (SHPO), that the site of the former Haskell Institute is eligible for listing on the National Register as a Historic District. The KCD has been advised by the Keeper that it misinterpreted the Keeper's findings, and that the Keeper has determined that the property is **not eligible** for listing as a Historic District. The Keeper has determined that those areas within the boundary of the former Haskell Institute that were used by the Institute for farming purposes are eligible for listing on the National Register as a historic site identified as the "Haskell Agricultural Farm Property." See **Appendix I, Section I, Item 1**, for the Keeper's November 7, 2002, eligibility determination.

The KCD, in a letter dated March 17, 2003, (see **Appendix I, Section I, Item 2**), informed the Keeper that the boundary of the "Haskell Agricultural Farm Property" depicted in the Keeper's November 11, 2002, eligibility determination did not include two properties that were previously part of the Haskell Institute's agricultural farm property. The Keeper, in a letter dated April 27, 2003, (see **Appendix I, Section I, Item 3**), provided KCD with a revised boundary for the "Haskell Agricultural Farm Property," which included the two previously omitted parcels of land.

Note: Due to KCD's misinterpretation of the Keeper's findings, that the proposed Haskell Institute Historic District (HIHD) is not eligible for listing on the National Register as a Historic District, many commenters incorrectly reference the site of the former Haskell Institute as a Historic District. Therefore, the reader should recognize KCD's error and consider impacts to the "Haskell Agricultural Farm Property," where appropriate, when commenters reference the "Haskell Institute Historic District."

10.2. Determination of Effect. On November 20, 2002, KCD provided the SHPO with a letter (see **Appendix I, Section J, Item 1**), requesting concurrence with KCD's Determination of Effect and proposed mitigation plan to resolve adverse effects to historic properties, which would occur as a result of KDOT's proposal to construct the bypass on the 32nd Street Alignment B route. Copies of KCD's letter and an invitation to submit comments were provided to the twenty-nine Kansas homeland and reservation tribes and all other Federally-recognized tribes and other parties that had expressed an interest in Section 106 issues. See **Volume 3, Appendix B-2 of the Final EIS** for a distribution list for KCD's Determination of Effect letter.

At the time of issuance of the Final EIS, KCD was consulting with agencies and other interested

parties regarding its Determination of Effect and proposed resolution of adverse effects associated with the 32nd Street Alignment B alternative. This was a lengthy process that began with KCD's November 20, 2002, Determination of Effect letter and ended with execution of a MOA on June 20, 2003. See **Volume 1, Chapter 4, Section 4.26.1 and Chapter 5, Section 5.5.6 of the Final EIS** for a discussion of the work initiated by KCD regarding the Determination of Effect and resolution of adverse effects prior to issuance of the Final EIS.

The KCD's Determination of Effect letter identified three historic properties within the project area. The KCD concluded that the Selected Alternative will have no effect on the H. Eggert Family Property, a pre-Civil War stone structure, or on the twelve National Historic Landmarks located on the HINU campus. The KCD further concluded that the Selected Alternative will adversely impact the Haskell Institute Historic District (later identified as the Haskell Agricultural Farm Property).

The KCD's Determination of Effect letter contained the following comprehensive mitigation proposals to resolve adverse effects to historic properties, which would occur as a result of the undertaking:

- The width of the bypass corridor passing through the Haskell Institute Historic District has been reduced to the minimum necessary to accommodate the eventual construction of a four-lane highway. The median between opposing lanes and the roadway shoulders are the minimum width necessary to satisfy highway transportation safety standards. These measures are intended to minimize the adverse impact of the proposed bypass on the Historic District.
- The alignment of the proposed bypass corridor has been designed to avoid as many historic features of the District as is feasible. The alignment avoids the historic east-west dike and adjacent drainage canal located along the northern edge of Baker Wetlands. The alignment also avoids all historic bridges and water control gate structures within the District.
- The existing section of 31st Street located within the District (approximately 13 acres) would be removed from the HINU property and relocated south into Baker Wetlands at a location parallel to and immediately north of the proposed bypass. The vacated 31st Street corridor would be graded and seeded/plugged to create open landscape similar to that in Baker Wetlands, unless the BIA and/or the HINU administration requests a different planting scheme. The corridors of the vacated and relocated 31st Street would have approximately the same width and acreage. Relocation of 31st Street is solely intended as mitigation to offset impacts associated with construction of the bypass. Moving 31st Street to a location adjacent to the proposed bypass would reduce the number of roadway corridors within the District from two to one. The consolidated alignment would result in a single corridor containing both roads and would substantially lessen the visual impact of routing two roadway corridors through the Historic District.
- Development of homes, businesses, and light industry is inevitable on the agricultural land east of Haskell Avenue and west of Louisiana Street, adjacent to Baker Wetlands in

the southern half of the Historic District. Such development would adversely impact the rural character of the District through increased traffic on Haskell Avenue and Louisiana Street, increased noise and light, and a general increase in human activity outside the District's boundary. In addition, such development would affect the character of the surrounding landscape due to construction of homes, businesses, industrial buildings, etc, on land currently used for cultivation.

- A cumulative total of approximately 300 acres of the adjacent farmland would be purchased east of Haskell Avenue and west of Louisiana Street to mitigate for the loss of approximately 53 acres of wetlands in Baker Wetlands in the southern half of the Historic District (32nd Street Alignment B – 25.4 acres, relocation of 31st Street – 14.4 acres, and construction of a pedestrian/bike trail – 12.8 acres). Haskell Avenue would be relocated approximately 1,000 feet east and Louisiana Street would be relocated approximately 2,500 feet west of their present locations and the vacated roadways would be removed. The 300-acre area created between the proposed new roadways and the vacated roads would be converted to wetlands and would be protected in perpetuity from urban development. This mitigation proposal would create a permanent buffer along the east and west sides of the southern half of the Historic District and would protect the District from noise, light, and litter associated with an urban environment. The buffer would also protect the District from the visual degradation of surrounding areas that would result from the inevitable encroachment of urban development.
- The KCD has determined that audible and visual disturbances associated with high speed traffic on the proposed bypass have a high potential to adversely affect the Historic District. A 12-foot-high wall is proposed along the north side of the bypass and a 6-foot-high wall (located on a pedestrian/bike trail) is proposed on the south side of the bypass to minimize traffic noise and to visually screen traffic from areas outside the bypass corridor. The proposed walls would also contain light and roadway debris, and would prevent wildlife from entering the roadway. The walls would be painted/tinted to blend with the background and would be screened with vegetative plantings to obscure their presence from outside the bypass corridor. Walls would not be constructed along the relocated 31st Street. We believe that noise and visual disturbances associated with the relocated 31st Street would be similar to or less than they would be if the road is not relocated.
- Recent noise studies have shown that the total audible disturbance associated with construction of the proposed 32nd Street Alignment B alternative, with the mitigation described above, would be less in the year 2025 (ending year for local land use planning) than such disturbances associated with the 42nd Street Alignment A alternative or the No-Build alternative. These findings result from: (a) relocation of Haskell Avenue and Louisiana Street which moves traffic noise farther east and west and creates a development free buffer along the District's flanks; and (b) construction of noise walls north and south of the proposed bypass corridor.
- Mitigation would include the use of limited and unobtrusive street lighting, if lighting would be required, for traveler safety along those segments of roadway located within the Historic District. Mitigation would also include routing road runoff east-west through

ditches within the roadway corridor to existing drainages outside the District. This proposal would prevent contaminated runoff from entering Baker Wetlands. Additional mitigation would include the preparation of detailed drawings and photographs, where appropriate, to document historic features which could be impacted by the undertaking.

Note: Refer to Appendix I, Section J, of this ROD for correspondence prepared by KCD concerning its Determination of Effect and for copies of comment letters received in response to the Determination of Effect. Refer to Section 3.1 in Enclosure 1 to this ROD for KCD's evaluation of those comments.

10.3. Resolution of Adverse Effects.

a. Draft Memorandum of Agreement. On February 19, 2003, KCD provided the Advisory Council on Historic Preservation (ACHP), State Historic Preservation Officer, Kansas Department of Transportation, Douglas County Commission, Baker University, Bureau of Indian Affairs, and Haskell Indian Nations University with a Draft MOA to resolve adverse effects to historic properties associated with the undertaking (see **Appendix I, Section K, Item 1**). The KCD, ACHP, and SHPO were identified as "Signatories" on the Draft MOA. Douglas County, Baker University, and KDOT were identified as "Invited Signatories" on the document due to their contractual obligations associated with mitigation requirements to resolve adverse effects. The BIA and HINU were identified as "Concurring Parties" due to their interest in the historic property. Both the BIA and HINU declined to participate as concurring parties to the MOA (see **Appendix I, Section K, Items 4 and 14, respectively**). Copies of the Draft MOA and an invitation to submit comments were provided to the twenty-nine Kansas homeland and reservation tribes and all other Federally-recognized tribes and other parties that had expressed an interest in Section 106 issues (see **Appendix I, Section K, Item 2**).

The Draft MOA contained the following conditions to resolve adverse effects to historic properties:

1 The Kansas Department of Transportation shall relocate the existing section of 31st Street located on the HINU campus to an alignment immediately north of the Kansas Highway 10 bypass (32nd Street Alignment B) on Baker University property in Baker Wetlands. The Kansas Department of Transportation shall remove the abandoned section of 31st Street, including bedding material, located on the HINU campus and shall grade the vacated right-of-way to approximate the contours/elevations of existing adjacent ground. The Kansas Department of Transportation shall confer with HINU/BIA representatives to develop and implement a vegetative planting scheme for the vacated 31st Street right-of-way.

2 Douglas County, Kansas shall vacate the section of 31st Street located on the HINU campus and shall relinquish its easement for the right-of-way to the United States of America.

3 The Kansas Department of Transportation shall relocate Haskell Avenue approximately 1,000 feet east of its present location and Louisiana Street approximately 2,500 feet west of its present location for those sections of the roads located adjacent to that portion of the HIHD located in Baker Wetlands. The Kansas Department of Transportation shall remove the abandoned sections of Haskell Avenue and Louisiana Street and grade the right-of-ways to approximate the contours/elevations of the existing adjacent ground. The Kansas Department of Transportation shall ensure that the 304-acre area created between the relocated and vacated roads will be converted to mitigation wetlands. The Kansas Department of Transportation shall further ensure that the 304 acres of mitigation wetlands will remain wetlands in perpetuity to serve as a buffer between the HIHD and future development on the east and west sides of that portion of the HIHD located in Baker Wetlands.

4 The Kansas Department of Transportation shall ensure that the width of the roadway corridor within the HIHD is the minimum necessary to accommodate the eventual construction of a four-lane Kansas Highway 10 bypass and relocation of 31st Street with four lanes. The Kansas Department of Transportation shall ensure that the roadways, medians between opposing lanes, and the roadway shoulders are the minimum width necessary to satisfy highway transportation safety standards in order to minimize the adverse impact of the roadway corridor on the HIHD.

5 The Kansas Department of Transportation shall construct a 12-foot-high wall (as measured from the roadway surface) along the north side of the highway bypass and a 6-foot-high wall located on a 6-foot-high dike (the top of the wall will be located 12 feet above the roadway surface) on the south side of the bypass along that portion of the bypass located within the HIHD to minimize traffic noise and visual disturbance in areas outside the bypass corridor. The walls shall be painted/tinted to blend with the background and shall be screened with vegetative plantings to obscure their presence from areas outside the roadway corridor.

6 The Kansas Department of Transportation shall develop and implement a plan to minimize construction-related impacts to the HIHD. The plan must be approved by KCD and shall be incorporated into the special conditions of KCD's Section 404 authorization for the undertaking. All construction equipment shall be either low ground pressure types or be required to operate on log mats. No grubbing will be allowed within the HIHD (cutting woody vegetation will be allowed). No staging areas or "lay down yards" will be located in the HIHD. Embankment construction will be limited to 300-meter-long sections at any one time.

7 The Kansas Department of Transportation shall ensure that the final roadway design will minimize adverse impacts to the HIHD, to the maximum extent practicable. The Kansas Department of Transportation shall ensure that the final roadway design will avoid the historic east-west dike and drainage canal located between Haskell Avenue and Louisiana Street and immediately south of the existing 31st Street, all historic water control gate structures, and all historic bridges within the HIHD.

8 The Kansas Department of Transportation shall document the HIHD features impacted by the undertaking by preparing a permanent record of the features through use of photographs, detailed drawings, and narrative, as appropriate. The Kansas Department of Transportation shall consult with and take direction from the SHPO to ensure preparation of a complete record.

9 If the Kansas Department of Transportation determines that lighting is required for traveler safety within that portion of the undertaking located in the HIHD, it shall limit such lighting to the minimum necessary to ensure traveler safety and shall install such lighting in a manner that will minimize impacts to areas outside the roadway corridor.

10 If the undertaking reveals a previously unidentified potential historic property or if the undertaking will result in unanticipated effects to an existing historic property, KDOT shall stop construction activities that have a potential to impact such properties and will notify KCD. The Kansas City District shall then contact the SHPO to determine a course of action (which may include further consultation) to address the property's eligibility for listing on the NRHP, to resolve potential adverse effects to a property, or to resolve any other issues.

11 The Kansas Department of Transportation shall monitor construction activities and shall inform all contractors to be alert to the potential for the discovery of artifacts or human remains. If culturally significant artifacts are encountered, work within the area of discovery shall stop immediately and KDOT shall consult with the SHPO to determine an appropriate course of action. If human remains are discovered, all work within the area of discovery shall stop immediately, the area shall be protected from further disturbance, and local law enforcement and the State Archaeologist shall be contacted immediately, in accordance with the Kansas Unmarked Burial Sites Preservation Act (KSA 75-2741 through 75-2754). In the event of a discovery of human remains the Kansas Department of Transportation shall comply with all provisions of the Unmarked Burial Sites Preservation Act.

12 The Kansas Department of Transportation shall invite all Kansas reservation tribes to provide a representative to monitor any construction-related excavation activities within the HIHD for the inadvertent discovery of unmarked burials. The Kansas Department of Transportation shall also accommodate any Federally-recognized tribes that wish to monitor excavation activities within the HIHD.

Note: Refer to Appendix I, Section K, of this ROD for correspondence prepared by KCD concerning its Draft MOA and for copies of comment letters received in response to the Draft MOA. Refer to Section 3.2 in Enclosure 1 to this ROD for KCD's evaluation of those comments.

b. Final Memorandum of Agreement.

The KCD considered the comments received in response to the Draft MOA and finalized the document in May 2003. The final document was routed for concurrence and

signature to all of the Kansas based Signatories and Invited Signatories in May 2003, and was mailed to the ACHP for concurrence and signature on May 20, 2003, (see **Appendix I, Section K, Item 22**). The executed document was returned to KCD by the ACHP on July 1, 2003, (see **Appendix I, Section K, Item 23**), with concurrence and signatures from all Signatories and Invited Signatories.

The Final MOA contains the following conditions to resolve adverse effects to historic properties:

1 The Kansas City District shall condition Section 404 authorization for the undertaking, where appropriate, to ensure that the stipulations of this MOA are implemented.

2 The Kansas Department of Transportation shall relocate the existing section of 31st Street (located on the HINU campus) to an alignment immediately north of the Kansas Highway 10 bypass (32nd Street Alignment B) on Baker University property in Baker Wetlands. The Kansas Department of Transportation shall remove the abandoned section of 31st Street, including bedding material, located on the HINU campus and shall grade the vacated right-of-way to approximate the contours/elevations of existing adjacent ground. The Kansas Department of Transportation shall confer with HINU/BIA representatives to develop and implement a vegetative planting scheme for the vacated 31st Street right-of-way.

3 Douglas County, Kansas, shall vacate the section of 31st Street located on the HINU campus and shall relinquish its easement for the right-of-way to the United States of America.

4 The Kansas Department of Transportation shall relocate Haskell Avenue approximately 1,000 feet east of its present location and Louisiana Street approximately 2,500 feet west of its present location for those sections of the roads located adjacent to that portion of the HAFP located in Baker Wetlands. The Kansas Department of Transportation shall remove the abandoned sections of Haskell Avenue and Louisiana Street and grade the right-of-ways to approximate the contours/elevations of the existing adjacent ground. The Kansas Department of Transportation shall ensure that approximately 304 acres of mitigation wetlands will be developed in the areas created between the relocated and vacated roads. The Kansas Department of Transportation shall convey a conservation easement in accordance with K.S.A. 58-3810, et. Seq., on the approximately 304 acre wetland mitigation area, to limit its future use to that consistent with this agreement, prior to a transfer of the property to a second party.

5 The Kansas Department of Transportation shall ensure that the width of the roadway corridor within the HAFP is the minimum necessary to accommodate the eventual construction of a four-lane Kansas Highway 10 bypass and relocation of 31st Street with four lanes. The Kansas Department of Transportation shall ensure that the roadways, medians between opposing lanes, and the roadway shoulders are the minimum width necessary to satisfy highway transportation safety standards in order to minimize the adverse impact of the roadway corridor on the HAFP.

6 The Kansas Department of Transportation shall construct a 12-foot-high wall (as measured from the roadway surface) along the north side of the highway bypass and a 6-foot-high wall located on a 6-foot-high berm (the top of the wall will be located 12 feet above the roadway surface) on the south side of the bypass along that portion of the bypass located within the HAFP to minimize traffic noise and visual disturbance in areas outside the bypass corridor. The walls shall be painted/tinted to blend with the background and shall be screened with vegetative plantings to obscure their presence from areas outside the roadway corridor.

7 The Kansas Department of Transportation shall develop and implement a plan to minimize construction-related impacts to the HAFP. The plan must be approved by KCD and shall be incorporated into the special conditions of KCD's Section 404 authorization for the undertaking. All construction equipment shall be either low ground pressure types or be required to operate on log mats. No grubbing will be allowed within the HAFP (cutting woody vegetation will be allowed). No staging areas or lay down yards will be located in the HAFP. Construction of the roadway embankment within the HAFP will be limited to 300-meter-long sections at any one time.

8 The Kansas Department of Transportation shall ensure that the final roadway design will minimize adverse impacts to the HAFP, to the maximum extent practicable. The Kansas Department of Transportation shall also ensure that the final roadway design will avoid the historic east-west dike and drainage canal located immediately south of the existing 31st Street between Haskell Avenue and Louisiana Street, all historic water control gate structures, and all historic bridges within the HAFP.

9 The Kansas Department of Transportation shall document the HAFP features impacted by the undertaking by preparing a permanent record of the features through use of photographs, detailed drawings, and narrative, as appropriate. The Kansas Department of Transportation shall consult with and take direction from the SHPO to ensure preparation of a complete record.

10 If the Kansas Department of Transportation determines that lighting is required for traveler safety within that portion of the undertaking located within the HAFP, it shall limit such lighting to the minimum necessary to ensure traveler safety and shall install such lighting in a manner that will minimize impacts to areas outside the roadway corridor.

11 The Kansas Department of Transportation shall monitor construction activities and shall inform all contractors to be alert to the potential for the discovery of cultural resources. If artifacts or previously unidentified archaeological sites are encountered, or if the undertaking will result in unanticipated effects to an existing historic property, KDOT shall stop construction activities that have a potential to impact such properties and shall immediately notify KCD and the SHPO that such action has taken place. In the event of such notification, KCD will consult with the SHPO and other interested parties, as necessary, to determine an appropriate course of action.

12 If human remains are discovered, all work within the area of discovery shall stop immediately, the area shall be protected from further disturbance, and local law enforcement and the State Archaeologist shall be contacted immediately, in accordance with the Kansas Unmarked Burial Sites Preservation Act (K.S.A. 75-2741 through 75-2754). In the event of a discovery of human remains KDOT shall comply with all provisions of the Unmarked Burial Sites Preservation Act.

13 The Kansas Department of Transportation shall invite all Kansas reservation tribes to provide a representative to monitor all project-related excavation activities within the HAFP for the inadvertent discovery of unmarked burials. The Kansas Department of Transportation shall also accommodate any Federally-recognized tribe that wishes to monitor excavation activities within the HAFP. The Kansas Department of Transportation shall have the right to limit the number of tribal monitors on the construction site to a total of five, at any given time, and to impose such additional safety restrictions on monitors as it deems appropriate. Nothing in this stipulation shall require construction activities to be delayed due to the inability of monitors to be present on site during excavation activities.

10.4. National Historic Landmarks. The National Park Service (NPS), Midwest Region, provided KCD with copies of letters, dated April 2, 2003, (see **Appendix I, Section L, Items 1 through 3**), sent to Haskell Indian Nations University, the Bureau of Indian Affairs (property owner within the boundary of the former Haskell Institute), and Baker University (property owner within the boundary of the former Haskell Institute), to determine whether they are interested in expansion of the current Haskell Institute National Historic Landmark boundary to include the Haskell Institute's former agricultural areas. The KCD contacted the NPS on October 14, 2003, (see **Appendix I, Section L, Item 4**), to discuss the NPS findings. The NPS stated that they have received a reply from Baker University stating that they do not wish to expand the National Historic Landmark to include their property (Baker Wetlands). The NPS further stated that no response has been received from HINU or the BIA. The NPS informed KCD that, at this time, due to a lack of response from property owners they do not intend to pursue the matter further.

11. Compliance With Other Laws and Executive Orders. All applicable Federal, state and local laws, and Executive Orders were considered prior to KCD's selection of a roadway alignment for this project.

11.1. Other Laws.

a. Section 106 of the National Historic Preservation Act. The Selected Alternative complies with the provisions of Section 106. See discussion above in **Section 10** above.

b. Section 7 of the Endangered Species Act. The Selected Alternative will not impact any Federally-listed Threatened or Endangered Species or the critical habitat of such species.

c. Section 401 Water Quality Certification. The Kansas Department of Health and Environment certified on December 10, 2003, in accordance with Section 401 of the Clean

standards (see **Enclosure 3**). The state's certification contains conditions, which address water quality concerns. The conditions presented in the certification will be incorporated into the special conditions of the Department of the Army permit issued for this project, by reference, as stated in General Condition "5" of the permit document.

11.2. Executive Orders.

a. Order 11990 - Protection of Wetlands. The Selected Alternative complies with the intent of this Executive Order.

b. Order 11988 - Flood Plain Management. The Selected Alternative complies with the intent of this Executive Order.

c. Order 11898 - Environmental Justice. The Selected Alternative complies with the intent of this Executive Order.

12. Section 404(b)(1) Evaluation. The Selected Alternative has been evaluated in accordance with the guidelines developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army, and published at 40 CFR 230. The KCD has determined that the Selected Alternative complies with the Section 404(b)(1) guidelines. See **Enclosure 2** for KCD's evaluation.

Issued on 15 December 2003



DONALD R. CURTIS, JR.
Colonel, EN
Commanding



US Army Corps
of Engineers®
Kansas City District

**ENCLOSURE TO
RECORD OF DECISION
Kansas Highway 10 Relocation
(South Lawrence Trafficway)**

**RESPONSES TO COMMENTS RECEIVED BY THE KANSAS
CITY DISTRICT AFTER COMPLETION OF THE FINAL
ENVIRONMENTAL IMPACT STATEMENT**

December 2003

Permit Application Number: 200101697

Applicant: Kansas Department of Transportation

Environmental Impact Statement: Titled, "*Final Environmental Impact Statement – Section 404 Permit Application – by – Kansas Department of Transportation – K-10 Highway (South Lawrence Trafficway)*," prepared by the U.S. Army Corps of Engineers, Kansas City District, dated December 2002

Note: Refer to Appendix I, Volumes 1 and 2, of this Record of Decision (ROD) for copies of the comments received by the Kansas City District (KCD) after completion of the Final EIS.

1. Public and Agency Comments Received in Response to the Final EIS.

1.1. Federal Agencies.

a. U. S. Environmental Protection Agency. The Environmental Protection Agency (EPA), in a letter dated February 18, 2003, (see **Appendix I, Section A, Item 1**), stated that it has reviewed the Final EIS and that it is apparent that the reasonably expected future conditions and cumulative effects of multiple planned actions within the project area argue in favor of the Selected Alternative. The EPA further stated that it believes that the assumptions that underpin this argument are credible and are consistent with both the Clean Water Act Section 404(b)(1) Guidelines and National Environmental Policy Act (NEPA) implementing regulations.

The EPA provided the following additional comments:

- 1) The KCD should further consider and substantiate its Section 404 permit decision

through a completed Section 404(b)(1) evaluation. The evaluation should be included in the ROD for the project.

2) Culverts placed in the mitigation parcel located west of Naismith Creek should be properly sized to prevent damming of sheet flows.

3) If KCD issues a permit for the proposed project, the permit should include special conditions, as outlined in the Corps' Mitigation Regulatory Guidance Letter No. 02-2, to ensure that mitigation requirements for the project are ecologically sound, predictable, and enforceable.

KCD Response.

1) A Section 404 (b)(1) evaluation has been prepared for the project and is attached to this ROD.

2) The Section 404 permit issued for the project will be conditioned to ensure that culverts placed in association with the project are appropriately sized to limit damming of sheet flows and to avoid increases in flooding to adjacent property owners.

3) The Section 404 permit issued for this project will be conditioned to comply with the intent of Regulatory Guidance Letter No. 02-2.

b. National Park Service. The National Park Service (NPS), in an E-mail message dated February 10, 2003, (see **Appendix I, Section A, Item 2**), provided KCD with comments to the Draft EIS. The NPS stated that comments enclosed with their letter and dated September 13, 2002, should have been enclosed with a December 16, 2002, comment letter provided to KCD earlier. **(The KCD has no record indicating that it had received these comments earlier.)**

The NPS provided the following comments:

1) The NPS recommended that the 2001, Brockington and Associates, Inc. report titled, "Determination of Eligibility - For the National Register of Historic Places - of - Haskell Indian Nations University - And the Baker Wetlands - Douglas County, Kansas," be forwarded to the Keeper of the National Register of Historic Places (Keeper) for an evaluation of Baker Wetlands to determine if the property is eligible for inclusion in an expanded Haskell Institute National Historic Landmark (NHL) boundary.

2) The NPS cited the importance of National Natural Landmarks (NNL) and commented that the Draft EIS did not reference the status of Baker Wetlands as a NNL. The NPS stated that Federal agencies should consider the unique properties of a NNL, in compliance with NEPA requirements.

KCD Response.

1) The Brockington and Associates report has been provided to the Keeper of the National Register of Historic Places by KCD for the Keeper's evaluation of Section 106 issues. The KCD will not address the question of NHL status for Baker Wetlands. NHL nominations are not addressed under the provisions of Section 106 of the National Historic Preservation Act (NHPA) and are not KCD's responsibility. Nominations should be made by property owners or the NPS.

2) **Volume 1, Section 4.20.5, of the Draft EIS** notes that Baker Wetlands is a NNL. The Final EIS addresses potential project related impacts to the NNL.

1.2. State Agencies.

a. Kansas Biological Survey. The Kansas Biological Survey (KBS), in a letter dated March 6, 2003, (see **Appendix I, Section B, Item 1**), informed KCD that it was resubmitting comments to the Draft EIS that were not referenced in the Final EIS. The KBS stated that the comments, dated September 27, 2002, had been mailed to KCD previously. (**The KCD has no record indicating that it had received these comments earlier.**) The KBS notes that its September 27, 2002, comments primarily address the two Preferred Alternatives presented in the Draft EIS (32nd Street Alignment B and 42nd Street Alignment A).

The KBS provided the following additional comments:

- 1) The location of the 32nd Street alignment varies among the maps presented in the Draft EIS.
- 2) Wetlands should be avoided where possible.
- 3) Wetland delineations for alternative alignments are incomplete.
- 4) Wetland impacts associated with relocation of 31st Street and construction of hike and bike trails have not been considered.
- 5) Water quality impacts associated with the alignments have not been properly addressed.
- 6) Floodplain impacts on wetlands and other floodplain values are not properly addressed.
- 7) Properties owned by the University of Kansas and Kansas Department of Wildlife and Parks, in the northeast corner of Baker Wetlands, are not reflected as part of Baker Wetlands on maps in the Draft EIS. It is not clear what mitigation will occur to address wetland losses within these properties.

KCD Response.

- 1) The location of the 32nd Street alignment is accurately reflected in the Final EIS.
- 2) Wetland losses have been avoided where practicable. Although the Selected Alternative will result in substantially greater immediate wetland losses than many of the other alternatives considered, KCD has determined that it will have fewer cumulative long-term impacts on wetlands than the 42nd Street alignment.
- 3) Comprehensive wetland delineations have been completed for the 32nd Street Alignment B alternative and the 42nd Street Alignment A alternative and are presented in the Final EIS.
- 4) All wetland impacts associated with the Selected Alternative, including relocation of 31st Street and construction of hike and bike trails, have been considered and are addressed in the Final EIS.
- 5) Water quality impacts are discussed in detail in the Final EIS.
- 6) Impacts to wetlands within the floodplain and other floodplain values are addressed throughout the Final EIS.
- 7) Maps presented in the Final EIS have been modified, where necessary, to accurately reflect the boundary of Baker Wetlands. The mitigation plan presented in the Draft and Final EIS includes mitigation for wetland losses within the University of Kansas and Kansas Department of Wildlife and Parks properties located in the northeast corner of

Baker Wetlands.

b. Kansas Department of Health and Environment. The Kansas Department of Health and Environment, in a letter dated February 14, 2003, (see **Appendix I, Section B, Item 2**), provided KCD with information on known underground and aboveground storage tank locations near 31st Street.

KCD Response. The information provided by the Kansas Department of Health and Environment is similar to information previously collected by KCD and presented in the Final EIS.

c. Kansas Department of Agriculture. The Kansas Department of Agriculture (KDA) provided KCD with Application Notice No. 02527, dated February 18, 2003, (see **Appendix I, Section B, Item 3**), which addresses KDOT's request to KDA for authorization to perform work related to relocation of K-10 Highway. The application provides interested agencies and individuals with an opportunity to provide comments to KDA regarding the proposed work.

KCD Response. The KDA application is noted.

1.3. Local Agencies.

a. Douglas County Commission. The Board of County Commissioners, Douglas County, Kansas, in a letter dated February 26, 2003, (see **Appendix I, Section C**), stated that the 32nd Street Alignment B alternative is the Commission's preferred alignment.

KCD Response. Comment noted.

1.4. Organizations.

a. Lawrence Chamber of Commerce. The Lawrence Chamber of Commerce, in a letter dated January 27, 2003, (see **Appendix I, Section D, Item 1**), affirmed its support for the Selected Alternative. The Chamber of Commerce stated that it believes that the Selected Alternative represents the best alternative for all involved parties.

KCD Response. Comment noted.

b. Wetlands Preservation Organization.

- The Wetlands Preservation Organization (WPO), in a letter dated February 15, 2003, (see **Appendix I, Section D, Item 2**), stated that the Final EIS is inadequate in addressing issues concerning American Indian students at Haskell Indian Nations University (HINU) and the American Indian community in the city of Lawrence concerning their cultural use of Baker Wetlands.

The WPO provided the following additional comments:

- 1) The Final EIS does not contain written and oral comments provided by HINU students to address the Draft EIS.
- 2) The Final EIS does not contain sufficient information regarding the history of the Haskell Institute and its farm.
- 3) The Final EIS does not contain sufficient information regarding abuse of early Haskell Institute students.
- 4) The validity of studies associated with the EIS is questionable.
- 5) The Haskell Institute farm area should remain undisturbed for continued use by Haskell University students, faculty, the American Indian community, and others that use and enjoy the area for spiritual, cultural, scientific, educational, and other purposes.

KCD Response.

1) Due to the volume of written and oral comments received in response to the Draft EIS, public comments are addressed in **Volume 1, Section 5.5.3, of the Final EIS** by identifying the number of individuals providing comments to a particular issue. A KCD response is provided for each issue identified. In addition, individuals providing comments and the issues raised by them are identified in **Volume 3, Appendix B-3, of the Final EIS**. All comments received have been made a part of KCD's administrative record for this project and are available to the public for review.

2) A report prepared for this project by Brockington and Associates, Inc., titled "*Determination of Eligibility – For the National Register of Historic Places – of – Haskell Indian Nations University – And the Baker Wetlands – Douglas County, Kansas,*" dated December 2001, addresses the history of the Haskell Institute. The report is provided in **Volume 2, Appendix A-13, of the Final EIS**.

3) The Brockington and Associates determination of eligibility report presents a limited discussion regarding the treatment of Native American students at the Haskell Institute.

- 4) The statement regarding the validity of studies associated with the EIS is noted.
- 5) The statement that Baker Wetlands should not be disturbed is noted.

- The Wetlands Preservation Organization, in a letter dated March 3, 2003, (see **Appendix I, Section D, Item 3**), stated that the Final EIS is inadequate in addressing issues concerning American Indian students at HINU and the American Indian community in the city of Lawrence regarding their cultural use of Baker Wetlands.

The WPO provided the following additional comments:

- 1) The Final EIS does not address the concerns raised by the Indian community of Lawrence at the September 12, 2002, public hearing for the project.
- 2) The Final EIS does not contain the written and oral comments provided by Haskell University students and others at the public hearing.
- 3) The KCD has excluded information on important cultural and historical issues in the Final EIS, and it is the opinion of the WPO that KCD has violated Indian civil rights and the students' right to practice their religion, which is protected under the American Indian Religious Freedom Act.
- 4) The Brockington and Associates report is incomplete and does not address Indian perspectives concerning cultural and historical resources at Haskell and especially the old

Haskell farm.

5) The impacts identified by HINU students regarding the trafficway are primarily religious/spiritual issues. Native American spiritual and cultural concerns for the environment, history, and education are viewed holistically, not as fragmented pieces separate from one another.

6) Students and tribes do not wish to identify unmarked burials of children who died at Haskell because they believe that skeletal remains would be removed when their locations are revealed.

7) Traditional tribal elders meet and pray at sacred sites within the old Haskell farm site and collect plants and mushrooms from these areas for use in traditional ceremonies. The WPO believes that the sites should not be disturbed in any manner by the project.

8) Haskell students use the site of the former Haskell farm for pipe ceremonies and other religious practices because the area has a meditative setting. Any road alignment in the Haskell-Baker Wetlands area would have a direct negative impact on the cultural practices of every tribe that has students enrolled in HINU. The project also impacts other Indian people that use the land, such as Haskell staff and faculty, and members of the Indian community living in the city of Lawrence.

KCD Response.

1) The KCD is satisfied that all comments have been properly addressed in the Final EIS.

2) Refer to KCD's response 1) to the WPO's February 15, 2003, letter addressed above.

3) The KCD prepared the subject EIS in accordance with NEPA requirements. The KCD is satisfied that Indian civil rights have not been violated and that students' rights to practice religion have not been infringed.

4) Comment noted.

5) Comment noted.

6) The Kansas Unmarked Burial Sites Preservation Act requires authorization from the Unmarked Burial Sites Preservation Board prior to disturbance of an unmarked burial site. The Board, which consists of 9 members, contains 1 member from each of the 4 Kansas reservation tribes.

7) Comment noted.

8) Comment noted.

- The Wetlands Preservation Organization submitted an undated petition containing 430 signatures (see **Appendix I, Section D, Item 4**). The petition contains the following statement: "We the undersigned, believe that the concerns of Haskell Indian Nations University, its students, and the Lawrence Community have not been properly addressed during the planning of the South Lawrence Trafficway. The Greater Lawrence community strongly supports the biological, cultural, educational, historical, and spiritual qualities of the Haskell-Baker Wetlands. We oppose the 31st alignment and request that an alignment south of the river be studied."

KCD Response. The Draft and Final EIS address two alternative alignments that are routed south of the Wakarusa River (42nd Street Alignment A and 42nd Street Alignment B).

c. **Haskell Environmental Research Studies Center.** The Haskell Environmental Research Studies Center (HERSC), in a letter dated February 17, 2003, (see **Appendix I, Section D, Item 5**), stated that the Final EIS does not include Native American and HINU community cultural concerns.

The HERSC provided the following comments:

- 1) Public, agency, and organization comment letters are not included in the Draft and Final EIS.
- 2) A systematic and extensive Environmental Justice evaluation has not been conducted nor included in the Draft and Final EIS.
- 3) In general, mitigation measures planned in the Final EIS address the Technical Outreach Services for Native American Communities review comments for the Draft EIS, as well as topics discussed in subsequent meetings with KCD representatives.
- 4) Development of the South Lawrence Trafficway has the potential to significantly disrupt the aesthetic constitution of the natural environment and subsequently impact use of ceremonial sites on the HINU campus. Tribes and HINU are likely to request involvement with agencies to create a cultural risk management program to help curtail potential impacts to their natural resources and cultural sites.

KCD Response.

- 1) Refer to KCD's Response 1) to the WPO's February 15, 2003, letter in **Section 7.4.b.** above.
- 2) The KCD is satisfied that the Final EIS addresses Environmental Justice issues related to this project in a thorough manner. The KCD has concluded, based on a comprehensive review of Environmental Justice issues, that the Selected Alternative will not have a disproportionately high and adverse human health or environmental effect on the minority student and employee population at HINU.
- 3) Comment noted.
- 4) Comment noted.

d. **Jayhawk Audubon Society.** The Jayhawk Audubon Society (JAS), in a letter dated February 14, 2003, (see **Appendix I, Section D, Item 6**), stated that they believe that an alignment south of the Wakarusa River should be the Preferred Alternative.

The JAS provided the following comments:

- 1) The existing conditions in Baker Wetlands have evolved over a period of 35 years and the creation of mitigation wetlands to provide conditions similar to those in Baker Wetlands could take 25 to 30 years. The time required to create mitigation wetlands associated with the Selected Alternative could delay the Society's co-sponsored annual wetlands field day until at least the year 2020 and possibly 2025. The value of Baker Wetlands for educational purposes has been grossly under-reported and under-appreciated.
- 2) The anticipated development pressure discussed in the Final EIS for areas east and west of Baker Wetlands is dependent upon annexation of the areas by the city of Lawrence. If annexation does occur development would be subject to the city's floodplain regulations, which discourages development in floodplains. If growth is anticipated south of the

Wakarusa River the 42nd Street alignment should be viewed as an alignment that would serve the metropolitan area in the future.

3) The Final EIS provides conflicting information regarding the height of the proposed noise walls along the Selected Alternative since the height of the walls is referenced as both 12 and 16 feet.

4) The EIS does not consider the potential for increased traffic on 31st Street and the need to mitigate for such increases.

5) Traffic noise on 31st Street may bounce off of the noise wall and be deflected towards HINU.

6) Will adequate space be available within the K-10 Highway right-of-way to accommodate construction vehicles as well as regular traffic? If a second phase of construction is required will K-10 Highway traffic be diverted to the new section of 31st Street between Haskell Avenue and Louisiana Street and, if so, will the effects be mitigated?

7) The rationale used to eliminate the 38th Street corridor from consideration as the Selected Alternative (isolation of Baker Wetlands from the Wakarusa River's riparian corridor) could be used to eliminate the 32nd Street Alignment B alternative because the noise barriers will separate the HINU wetlands from Baker Wetlands and the Wakarusa River. Eight lanes of traffic along the south side of the Lawrence Prairie Park area will constitute a significant barrier that will prevent wildlife from utilizing corridors to travel to and from Baker Wetlands and the Wakarusa River, and Prairie Park's upland woodlands and native prairie.

8) The noise study presented in Volume 1, Exhibit IV-9 shows noise increases associated with the 42nd Street Alignment A alternative primarily confined to roadway right-of-ways, which is similar to existing conditions. The addition of noise walls along the 42nd Street Alignment A route would help to reduce impacts to residential and farmland adjacent to the alignment.

9) Elimination of the interchange at Haskell Avenue would help alleviate some of the anticipated increase in traffic and allow the relocated highway to function as a true bypass.

10) The proposed removal of flap gates at the existing confluence of the diverted Naismith Creek drainage and the Wakarusa River, immediately east of Louisiana Street, would allow contaminated flood waters from the Wakarusa River to flow into the drainage ditch and enter Baker Wetlands. Has an evaluation been conducted to assess the long-term effect of the polluted water on Baker Wetlands? Should a control structure be constructed to prevent the Wakarusa River from backing into the ditch and causing Baker Wetlands to become a shallow lake?

KCD Response.

1) Construction of all features associated with the Selected Alternative will impact approximately 52.6 acres of Baker Wetlands. The remaining approximately 550 acres of wetlands will be undisturbed by the project. It appears unlikely that construction activities, including mitigation, will significantly impact recreational, educational, and other uses of Baker Wetlands.

2) Comment noted.

3) The two noise walls differ in height (as measured from the base to the top of each wall); however, the top of both walls will be located twelve feet above the highway surface.

4) Mitigation has not been developed to address increases in traffic on the relocated 31st Street since traffic will increase on 31st Street for all of the alternatives considered, including No-Action.

5) The relocated 31st Street will be moved off of the HINU campus to a location south of a woodland corridor and the northern Baker Wetlands levee. The woodland corridor and levee are expected to create a noise buffer between the relocated 31st Street and the HINU campus.

6) The KCD assumes that K-10 Highway traffic will not be diverted to the relocated section of highway until construction is complete. The KCD cannot predict how traffic would be routed if a second phase of construction (two lanes to four lanes) would occur along the relocated section of K-10 Highway.

7) Noise barriers constructed along the relocated K-10 Highway within Baker Wetlands will have some impact on wildlife movement between HINU property, and Baker Wetlands and the Wakarusa River. However, the affect of the noise walls is not expected to significantly impact wildlife populations within the area. The Naismith Creek overflow channel currently separates HINU property from Baker Wetlands. The only location where terrestrial wildlife can readily cross the boundary between Baker Wetlands and HINU property, when the creek is full, is on a single access road bridge crossing the Creek. The Selected Alternative will impact wildlife movement patterns between the Prairie Park area and areas south of the relocated highway. Such impacts are not expected to significantly affect wildlife populations within the area. Some species of terrestrial wildlife such as deer may create safe travel lanes along the two pedestrian access paths connecting areas north of the relocated highway with Baker Wetlands. The paths will pass under the new Haskell Avenue and Louisiana Street bridges.

8) Comment noted.

9) The Haskell Avenue/K-10 Highway bypass interchange will be a major access point for traffic entering and leaving the highway from the southern side of the Lawrence metropolitan area. Elimination of this interchange is not a practical solution to reduce traffic in the vicinity of Baker Wetlands and HINU.

10) Flood water cannot enter Baker Wetlands from the Wakarusa River unless overbank flooding occurs. The subject flap gates do not reduce or prevent flooding of Baker Wetlands by the Wakarusa River.

e. Sierra Club.

- The Kansas Chapter of the Sierra Club (KCSC), in a letter dated February 16, 2003, (see **Appendix I, Section D, Item 7**), stated that the Selected Alternative is unacceptable because of the negative spiritual, cultural, and educational impacts to HINU, the negative impacts to the Haskell-Baker Wetlands, and violation of the spirit and letter of the Presidential Directive on Environmental Justice.

The KCSC provided the following comments:

- 1) Reasonable and practicable alternatives exist to the environmentally destructive 32nd

Street alternative.

- 2) The EIS fails to properly consider combinations of alternatives.
- 3) Alternatives were dismissed too quickly.
- 4) Severe negative impacts would occur to the proposed Haskell Historic District.
- 5) Extreme negative impacts would occur to the Haskell-Baker Wetlands, Prairie Park Nature Center, and wildlife in the area.
- 6) The cost differential between the 32nd Street and the 42nd Street alternatives has been overstated.
- 7) Impacts to Haskell University and the Haskell-Baker Wetlands are grossly understated in the EIS.
- 8) The mitigation proposal for 32nd Street cannot and will not replace the lost portions of the Haskell-Baker Wetlands.
- 9) The KCD has improperly assessed land use patterns and future development south of the Wakarusa River to justify the choice of 32nd Street.
- 10) The KCD has grossly underestimated the importance of the Haskell-Baker Wetlands to Native Americans. It has been and continues to be used for important religious, spiritual, and cultural purposes and should be preserved intact to honor those traditions and comply with applicable laws.
- 11) This project, if built on 32nd Street, will disproportionately impact Native Americans in violation of Executive Order 12898 on Environmental Justice.
- 12) The EIS fails to consider serious air quality deterioration aspects of the SLT, particularly if it is located on 32nd Street.
- 13) The Final EIS does not mention written comments from the KCSC submitted to KCD at the September 12, 2002, public hearing for this project.

KCD Response.

- 1) The KCD has determined that the Selected Alternative is the least environmentally damaging practicable alternative available to KDOT. The Final EIS describes in detail the basis for selection of the 32nd Street alignment.
- 2) The EIS addresses a broad range of alternatives that were considered but were not determined to be reasonable. Many of these alternatives are cited by KCSC in their comment 2. Such alternatives include enhanced public transit, improvements to 23rd Street, expansion of 31st Street to a four-lane road, a tunnel under Baker Wetlands, and more. These alternatives were rejected because they did not meet the project's purpose and need, were too costly, or were not practical for other reasons. These alternatives are not considered desirable either individually or in combinations.
- 3) The KCD is satisfied that among all of the alternatives evaluated for this project the Selected Alternative best reflects the overall public interest in this matter.
- 4) Although the Final EIS states that the Keeper supports the findings of KCD and the State Historic Preservation Officer (SHPO) that HINU and Baker Wetlands are eligible for listing as a Historic District, that statement is in error. Recent communication between the Keeper and KCD have revealed that KCD misinterpreted the Keeper's findings and that the Keeper has determined that the property is not eligible for listing as a Historic District. The Keeper has determined that the property is eligible for listing on the National Register as a historic site identified as the "Haskell Agricultural Farm Property." The Selected Alternative will not significantly impact the historic property. The site is currently

bisected by 31st Street. The 31st Street road will be removed to ensure that only one roadway corridor passes through the property. Safe access between Baker Wetlands and HINU will be provided through construction of a pedestrian path that will not expose students to traffic.

5) All roads present some degree of hazard to wildlife. The Selected Alternative is not expected to significantly impact wildlife populations in the area. See KCD's Response 7) to the Jayhawk Audubon Society's February 14, 2003, letter in **Section 1.4.d.** above.

6) The basis for KCSC's statement that costs shown in the Final EIS for the 32nd Street and 42nd Street alternatives are suspect and appear to understate the actual cost of building the 32nd Street route while overstating the cost to build the 42nd Street route is unclear. The KCD has independently reviewed the methodology used by KDOT to develop costs for the two alignments and has determined that the assumptions, pricing, and other factors used to develop project costs are reasonable and consistent with those used by KDOT for other similar projects. See **Appendix I, Section M**, for KCD's findings regarding its review of KDOT's cost estimates.

7) Comment noted.

8) Comment noted.

9) Conclusions regarding land use patterns have been drawn from all available information.

10) Comment noted.

11) Based on all available information, KCD concluded that the Selected Alternative will not have a disproportionately high and adverse human health or environmental effect on any minority or low-income population. The KCD is not aware of any new information that would cause it to reevaluate its decision.

12) The project area is classified as an attainment area by EPA. Since the project involves relocation of an existing section of highway, rather than development of a new highway that did not previously exist, the project is not expected to significantly impact air quality standards.

13) The Final EIS states that due to the large number of comments received in response to the Draft EIS (2,951 comments) public comments are addressed by identifying the number of comments received relating to a particular issue. The KCSC's comments are addressed with all other public comments presented in **Volume 1, Chapter 5, of the Final EIS**. The KCSC's comment letter has been made a part of KCD's administrative record for this project and is available to the public for review.

- The Wakarusa Group, Kansas Chapter of the Sierra Club (WGKCSC), in a letter dated February 17, 2003, (see **Appendix I, Section D, Item 8**), stated that they oppose the Selected Alternative due to extensive wetland impacts, lack of appropriate wetland sequencing, and environmental justice issues.

The WGKCSC provided the following comments:

1) The project is likely to significantly alter Baker Wetlands hydrology causing irreparable damage. The project may degrade water quality in the wetland due to runoff of road chemicals, and may have a deleterious effect due to increased air pollution, noise, and light. Animal use of, movement through, and breeding at Baker Wetlands and the adjacent uplands will be affected. Edge effect resulting from the project will degrade or destroy

more wetland habitat than is estimated in the Final EIS. Other practicable alternatives such as the 42nd Street alternative and commuter rail or both are available to deal with regional traffic issues.

2) The WGKCSC supports the nomination of all land associated with the site of the former Haskell Institute for listing on the National Register of Historic Places. The KCD should comply with the provisions of Section 106 of the National Historic Preservation Act. The KCD should consult with all Indian tribes that attach religious and cultural significance to historic properties that may be affected by the project.

3) Mitigation for wetlands has a poor success record.

4) The KCD did not follow the Section 404(b)(1) Guidelines in the selection of the 32nd Street alignment since other alternatives evaluated would have less impact on wetlands.

5) The project creates environmental justice issues for the Haskell community.

6) The 32nd Street alignment is in a poor location to solve regional traffic issues since it will bisect urban areas when it is built.

7) The Selected Alternative is not in compliance with the National Congress of American Indians resolution No. EWS-02-003, which opposes construction of the relocated highway on any HINU past and present property.

KCD Response.

1) The KCD has determined that the project will not significantly impact the area's drainage patterns or the hydrology of Baker Wetlands. The KCD has also determined that the project has a very low potential to impact water quality in Baker Wetlands. As stated in the Final EIS, roadway runoff will be directed into roadside ditches that will prevent the runoff from entering Baker Wetlands. Air pollution and increases in light associated with the project will be minimal. Project-related impacts to area wildlife will not be significant. Impacts on terrestrial wildlife movement between Baker Wetlands and areas north of the project are discussed in KCD's Response 7) to the Jayhawk Audubon Society's February 14, 2003, letter in **Section 1.4.d.** above. Based on all of the information available to KCD at this time, KCD is satisfied that the total number of acres of wetlands that will be impacted by the project are accurately reflected in the Final EIS. The KCD is also satisfied that among all of the alternatives evaluated for this project the Selected Alternative best reflects the overall public interest in this matter.

2) The WGKCSC comment that they support the nomination of all land associated with the site of the former Haskell Institute for listing on the National Register of Historic Places is noted. The KCD has complied with the provisions of Section 106 of the National Historic Preservation Act and has consulted with all Federally-recognized Indian tribes (approximately 576 tribes).

3) Much of the wetland mitigation associated with this project will occur in hydric soils and will restore wetlands previously impacted by agricultural practices. Wetland restoration typically has a high success rate.

4) A Section 404(b)(1) evaluation has been prepared for this project and is presented in **Enclosure 2 of this ROD.**

5) The KCD has determined that the project complies with Federal policies relating to Environmental Justice.

6) The relocated highway is designed as a limited access road. Development is anticipated south of the highway but is not expected to conflict with the road.

7) Comment noted.

f. University of Kansas Student Senate. The University of Kansas Student Senate provided KCD with Resolution No. 2002-308, dated March 15, 2002, (see **Appendix I, Section D, Item 9**), stating that the Student Senate opposes any route for the relocation of K-10 Highway that would be located within or immediately adjacent to the Haskell–Baker wetlands. A copy of a similar resolution (Resolution No. 1994-306, dated November 5, 1993), which addressed an earlier proposal by the Federal Highway Administration to relocate K-10 Highway on the existing 31st Street was enclosed with Resolution No. 2002-308.

Resolution No. 2002-308 provides the following statements:

- 1) The wetlands provide significant environmental benefits including filtration of surface water, wildlife habitat, flood control, and aesthetic values.
- 2) Mitigated wetlands are not as diverse or ecologically productive as natural wetlands.
- 3) Haskell-Baker Wetlands provide extensive and unique opportunities for cultural, social, political, scientific, spiritual, and historical educational opportunities.
- 4) Any alignment that passes through or near Haskell-Baker Wetlands will be damaging to the cultural, historical, spiritual, and environmental values of the wetlands.
- 5) The NEPA requires that all plausible alternatives be addressed.
- 6) The KCD has not met its obligation as mandated by law to communicate with Native American tribes to address issues relating to the project.
- 7) The KCD has not justified or explained the rationale for treating native Kansas tribes differently than other tribes with specific ties to HINU.
- 8) The KCD is required to recognize the political sovereignty and supremacy of indigenous nations within the United States.
- 9) The KCD is obligated to uphold United Nations treaties between the United States and indigenous nations that deal specifically with impacts on Native Americans and must follow the Native American Graves Protection and Repatriation Act guidelines when unmarked graves are found, as well as sacred sites and traditional cultural properties.
- 10) The apparent superceding of the process by mitigating and purchasing portions of the Haskell-Baker Wetlands before an EIS was completed has not been fully justified.
- 11) The Student Senate supports HINU's bid that the Haskell-Baker Wetlands be given historical landmark status.

KCD Response.

- 1) Comment noted.
- 2) This statement is not true for all mitigation wetlands. Much of the wetland mitigation associated with this project will occur in hydric soils and will restore wetlands previously impacted by agricultural practices. Wetland restoration typically has a high success rate.
- 3) Comment noted.
- 4) Comment noted.
- 5) The Draft and Final EIS address reasonable alternatives identified by KCD in accordance with NEPA implementing regulations.

6) The KCD consulted with all Federally-recognized Indian tribes (approximately 576 tribes) to address tribal issues related to the project. Consultation was an ongoing process that continued until this ROD was finalized.

7) The KCD identified 29 Kansas reservation and homeland tribes. These tribes were invited to consult with KCD on a government-to-government basis because of their unique relationship with state lands. A request to initiate government-to-government consultation with KCD is an option available to all Federally-recognized tribes.

8) Comment noted.

9) Comment noted.

10) The KCD is not aware of the initiation of any mitigation activities by KDOT for this project, nor is KCD aware of the purchase of any property within Haskell or Baker wetlands prior to completion of the EIS or this ROD. Such action is a KDOT prerogative and is not within KCD's purview.

11) Comment noted.

g. Native American Fish & Wildlife Society. The Native American Fish and Wildlife Society (NAFWS) provided KCD with Resolution No. 2003-02, dated May 21, 2003, (see **Appendix I, Section D, Item 10**), stating that the NAFWS strongly urges KCD to deny authorization to KDOT to relocate K-10 Highway on the 32nd Street alignment.

Resolution No. 2003-02 provides the following statements:

1) The 32nd Street alignment would unreasonably and irreparably damage important environmental, scientific, cultural, historical, and religious resources by severely damaging the Haskell-Baker Wetlands. The wetlands have great value as environmental habitat and as a natural laboratory for college level study of biology and wetland environments, and have been used by Indian students for over 100 years as a cultural and religious resource and for practice of traditional customs.

2) Construction in wetlands should be avoided when possible.

3) Impacts to Haskell-Baker Wetlands can be avoided by using either the 42nd Street alignment or the No-Build Alternative.

KCD Response.

1) Comment noted.

2) Wetland losses have been avoided where practicable. Although the Selected Alternative will result in substantially greater immediate wetland losses than the 42nd Street alignment, KCD has determined that it will have fewer cumulative long-term impacts on wetlands than any other alternative considered.

3) Comment noted.

1.5. Individuals.

a. Comment Letters. Eighty-five individuals provided written comments to the Final EIS (see **Appendix I, Section E, Item 1**). A summary of the comments received by KCD is presented in **Appendix I, Section E, Item 1**. The comment summary identifies the number of individuals providing comments relating to a particular issue and the percentage those comments represent relative to the total number of commenters.

The following comment categories were identified: 1) local planning, 2) neighborhood impacts, 3) economic development, 4) public health, 5) flooding, 6) general environmental issues, 7) threatened and endangered species, 8) Haskell school history, 9) general Native American issues, 10) collection of medicinal plants, 11) Native American religious practices, 12) traditional cultural properties, 13) Native American Graves Protection and Repatriation Act, 14) unmarked burial sites, 15) historic properties, 16) light, 17) noise, 18) traffic, 19) air quality, 20) water quality, 21) wetlands, 22) general support for the trafficway, 23) opposition to the Selected Alternative (32nd Street Alignment B), and 24) general uncategorized issues.

KCD Response. Comment noted.

b. Comments on Preprinted Forms. One hundred and seven individuals provided written comments to the Final EIS (see **Appendix I, Section E, Item 2**), on preprinted forms containing the following questions: 1) How Do You Currently Use The Wetlands?, and 2) How Would Your Use Of The Wetlands Be Affected If The Road Was Built? A summary of the comments received by KCD is presented in **Appendix I, Section E, Item 2**. The comment summary identifies the number of individuals providing comments relating to a particular issue and the percentage those comments represent relative to the total number of commenters.

- The following comment categories were identified in response to the question How Do You Use The Wetlands?: 1) do not use, 2) water quality issues, 3) observe nature/wildlife, 4) photography, 5) drawing/painting, 6) writing, 7) walking/running, 8) relaxation, 9) prayer, 10) spiritual practices, 11) ceremonies, 12) cultural research, 13) collecting plants, 14) research/learning, and 15) uncategorized comments.

- The following comment categories were identified in response to the question How Would Your Use Of The Wetlands Be Affected?: 1) do not use, 2) environmental issues, 3) water quality issues, 4) observe nature/wildlife, 5) photography, 6) drawing/painting, 7) writing, 8) walking/running, 9) relaxation, 10) prayer 11) spiritual practices, 12) ceremonies, 13) cultural research, 14) collecting plants, and 15) research/learning.

KCD Response. Comment noted.

1.6. Universities.

a. Haskell Indian Nations University. Haskell Indian Nations University, in a letter dated February 14, 2003, (see **Appendix I, Section F, Item 1**), provided the following statements:

- 1) The Draft EIS does not include all of the concerns and information contained in letters, reports, documents, and tribal council resolutions submitted from the school's students, alumni, faculty, administration, the Board of Regents, and the Indian Nations that HINU serves.

2) The Final EIS does not contain many of the documents referenced in 1) above, including “All Things Are Connected.”

3) The Draft EIS, through omission, inaccurately presents a picture of the environmental and cultural impacts to the school’s campus and its students.

4) The Draft EIS should be reconfigured to include in a single section all documents from HINU students, student organizations, the Board of Regents, alumni, the university administration, Indian Nations, national American Indian organizations, and the Office of Indian Education Programs.

KCD Response.

1) The Draft EIS provides an overview of the Native American concerns provided to KCD. All of the information received in response to KCD’s Notice of Intent to prepare a Draft EIS was considered during preparation of the draft document; however, due to the volume of the information collected by KCD, it was not feasible to include all of the reports and other documents in the Draft EIS. All of the comments and other information received have been made a part of KCD’s administrative record for this project and are available to the public for review.

2) All comments received by KCD in response to the Draft EIS were considered in KCD’s final selection of a route for this project (Selected Alternative). All of the comments received are addressed in **Volume 1, Chapter 5, and Volume 3, Appendix B-3, of the Final EIS**. As stated in 1) above, it was not feasible to include all of the reports and other documents collected by KCD in the Final EIS.

3) Comment noted.

4) KCD does not consider this request reasonable. The Draft EIS will not be amended to include a single section containing all Native American documents provided to KCD. The subject documents have been made a part of KCD’s administrative record for this project and are available to the public for review.

b. Baker University. Baker University, in a letter dated March 31, 2003, (see **Appendix I, Section F, Item 2**), provided KDOT with a copy of a verbal presentation made to the Jayhawk Audubon Board on March 20, 2003, by Dr. Roger Boyd, a Baker University faculty member. The letter was then forwarded to KCD for inclusion in its records. The presentation describes the history of Baker University’s management of Baker Wetlands and the University’s rationale for support of the 32nd Street alignment.

Dr. Boyd provided the following statements:

1) Baker University created Baker Wetlands by physically modifying the drainage structures installed by the Haskell Institute early in the 1900s.

2) All of the alternatives considered, other than the 32nd Street alignment, will result in expansion of 31st Street and loss of access to Baker Wetlands north gate.

3) The 32nd Street alternative will result in expansion of Baker Wetlands and will provide an endowment that will ensure maintenance of the wetland in perpetuity.

4) Wetland mitigation associated with the 32nd Street alignment will occur in hydric soils and, therefore, should be considered wetland restoration. The proposed mitigation plan has all of the ingredients for a successful outcome.

KCD Response.

- 1) Comment noted.
- 2) Comment noted.
- 3) Comment noted.
- 4) Comment noted.

2. Comments Received From Tribal Governments and Tribal Elders.

2.1. Tribal Governments (Consultation).

a. **Mandan, Hidatsa and Arikara Nation.** The Mandan, Hidatsa and Arikara Nation (Three Affiliated Tribes), in a letter dated March 3, 2003, (see **Appendix I, Section G, Item 1**), stated that relatives of the Nation are buried in the Haskell Cemetery and it is possible that relatives may be present in unmarked burials scattered throughout the former site of the Haskell Institute. In addition, it is possible that the project will impact ancient sacred and cultural resources associated with the Nation.

The Nation stated that based on these concerns they oppose the proposed trafficway for the following reasons:

- 1) The Nation does not agree that KCD has consulted with them. The Nation requests that KCD conduct a face-to-face meeting with its leadership before a final decision is reached regarding the proposed trafficway project.
- 2) The Final EIS does not indicate that a number of tribes including the Nation expressed objections to the 32nd Street alignment.
- 3) The Keeper of the National Register of Historic Places stated that the record did not contain enough information to evaluate the site of the former Haskell Institute to determine if it is a Traditional Cultural Property. Therefore the effort made to evaluate the property as a Traditional Cultural Property was poorly done or not done at all.
- 4) In a letter dated December 16, 2002, the NPS stated that the Brockington and Associates report failed to consider several factors that render Baker Wetlands historically significant. They also stated that creation of a road through the wetlands or upper fields would impact the historic character of the former agricultural fields and would separate the fields from HINU.
- 5) The KCD did not consult with the Nation; therefore, the MOA prepared under Section 106 is not adequate.
- 6) During a visit to HINU in the late 1990s, one of the Nation's traditional spiritual leaders attended ceremonies at the school and observed a number of unmarked burials of Haskell children scattered throughout the wetland complex.
- 7) The 32nd Street alignment has Environmental Justice implications.

KCD Response.

1) The KCD provided the Nation with a letter on February 6, 2002, and again on March 25, 2002, inviting the Nation to consult on a government-to-government basis to address issues of importance to the Nation concerning the proposed project. No response was received from the Nation. In addition, KCD contacted the Nation by telephone on March 4, 2002; April 12, 2002; April 18, 2002; May 10, 2002; May 22, 2002; and on May 30,

2002, in an effort to determine if the Nation would like to participate in a government-to-government meeting. No response was received from the Nation. In response to Mr. Halls March 3, 2003, letter KCD renewed its efforts to establish a government-to-government consultation meeting with the Nation. The KCD contacted the Nation on at least five occasions after receipt of Mr. Halls March 3, 2003, letter and was unsuccessful in its efforts to establish a meeting date with Mr. Hall.

2) Volume 3, Appendix B-7, of the Final EIS contains copies of all tribal comments received prior to issuance of the Draft EIS. Although Appendix B-7 should also contain copies of tribal comments received in response to the Draft EIS, those copies were inadvertently omitted from the Appendix. However, all comments received by KCD in response to the Draft EIS were considered in KCD's final decision regarding the Selected Alternative. In addition, all comments received in response to the Draft EIS are addressed in **Volume 1, Chapter 5, and Volume 3, Appendix B-3, of the Final EIS.**

3) The KCD, SHPO, and the Keeper all concluded that the site of the former Haskell Institute is not eligible for listing on the National Register of Historic Places as a Traditional Cultural Property. The KCD considered all available information prior to making its decision and provided that information and its rationale to the SHPO and the Keeper. The Keeper did not conclude that it did not have sufficient information upon which to make a decision, it concluded that based on all available information the property did not satisfy Criterion A and was not eligible for listing as a Traditional Cultural Property.

4) Comment noted.

5) See response 1) above.

6) Baker Wetlands has been carefully surveyed for the presence of unmarked human burials along the Selected Alternative's alignment. The survey did not provide any indication that unmarked burials are likely to be present along the alignment.

7) The KCD has concluded, based on a thorough review of Environmental Justice issues, that the Selected Alternative will not have a disproportionately high and adverse human health or environmental effect on the minority student and employee population at HINU.

b. Prairie Band Potawatomi Nation.

- The Prairie Band Potawatomi Nation, in a letter dated December 27, 2002, (see **Appendix I, Section G, Item 2**), stated that it wished to identify concerns regarding KCD's consideration of possible roadway alignments. The Tribe's letter has been addressed in this document since it was received too late to be addressed in the Final EIS. See **Appendix I, Section G, Item 10**, for KCD's June 12, 2003, written response to the Tribe's letter.

The Tribe provided the following comments:

- 1)** Wetlands must be avoided if possible.
- 2)** Wetland impacts have been ignored.
- 3)** The KDOT's project costs used to compare alternatives are inaccurate. The 42nd Street Alignment A alternative reflects a longer bridge than is necessary through the Wakarusa River floodplain and, therefore, an inaccurate construction cost.

KCD Response.

1) The KCD determined that the Selected Alternative complies with EPA's Section 404(b)(1) Guidelines for evaluating discharges of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act. The 32nd Street Alignment B alternative has been identified by KCD as the Selected Alternative in the Final EIS based on KCD's determination that it is the least environmentally damaging practicable alternative available to KDOT.

2) The KCD is satisfied that wetland impacts associated with this project have been thoroughly evaluated and addressed in the Final EIS. A comprehensive assessment of wetland impacts has been completed along both the 32nd Street Alignment B alternative and the 42nd Street Alignment A alternative. The Final EIS identifies a cumulative total of 57.6 acres of wetland losses associated with the 32nd Street alignment and 4.45 acres associated with the 42nd Street alignment.

3) The Final EIS identifies the estimated construction, operation, and maintenance cost for the 32nd Street Alignment B alternative as \$110,200,000 and for the 42nd Street Alignment A alternative \$128,500,000 – a difference of \$18,300,000. The length of the 42nd Street bridges crossing the Wakarusa River are primarily determined by the width of the Federal Emergency Management Agency's (FEMA) designated floodway. The length of the eastern bridge (total length 4,300 feet) is increased approximately 700 feet due to its crossings over Naismith Creek and North 1250 Road (35th Street).

- The Prairie Band Potawatomi Nation, in a letter dated February 14, 2003, (see **Appendix I, Section G, Item 3**), addressed construction cost estimates related to the 32nd Street Alignment B alternative and the 42nd Street Alignment A alternative. The Tribe's letter enclosed a nomination that the Haskell campus be listed on the National Trust's 2003 list of most endangered places in America, a chronology of the Haskell-Baker Wetlands and the South Lawrence Trafficway, and a transcript of video tape recordings of tribal elders. The Tribe's letter requests that KCD obtain, review and provide additional information and analysis to determine if the eastern 42nd Street bridge length is absolutely necessary. If the length of the bridge were reduced by 75 percent \$40,000,000 could be saved for the alignment. Channelization and other options should be considered to reduce the length of the bridge. See **Appendix I, Section G, Item 10**, for KCD's June 12, 2003, written response to the Tribe's letter.

KCD Response. As stated above in KCD's Response 3) to the Tribe's December 27, 2002 letter, the length of the eastern 42nd Street Alignment A bridge is primarily determined by the width of FEMA's designated floodway within the Wakarusa River floodplain. The floodway was remapped by FEMA in 2001, and is designated as a no-rise area. Due to the no-rise requirement, no fill may be placed within the floodway if it results in a measurable increase to the 100-year flood elevation. Although it may be theoretically possible to redesign the subject bridge to utilize some earthen fill in lieu of an elevated structure, such modifications are not considered practical or cost effective due to the additional work required to offset increases to the 100-year flood elevation. Such additional work would most likely include channelization of the Wakarusa River, construction of a new channel through the floodplain, and long-term maintenance of the channel (removal of vegetation

and debris) to satisfy no-rise requirements. The nomination, chronology and transcript provided by the tribe have been reviewed by KCD.

- The Prairie Band Potawatomi Nation, in a second letter dated February 14, 2003, (see **Appendix I, Section G, Item 4**), provided an affidavit from an individual attesting to the discovery of human remains at two locations in Baker Wetlands. The Tribe has requested that the affidavit not be released to the public. Therefore, the Tribe's letter is included in the Appendix to this ROD without the subject affidavit. See **Appendix I, Section G, Item 10**, for KCD's June 12, 2003, written response to the Tribe's letter.

KCD Response. The Final EIS discusses the actions taken by KCD to determine if unmarked human burials are present in Baker Wetlands. The KCD has informed the Tribe that it is not aware of any individual qualified to provide the race, approximate date of death, and other forensic information who has ever been made aware of the location of an unmarked human burial in Baker Wetlands. The KCD recommends that anyone who believes he/she has discovered the location of an unmarked human burial in Baker Wetlands immediately contact the Douglas County Sheriffs Department, as required by state law (Kansas Unmarked Burial Sites Preservation Act). The KCD also recommends that such persons contact the Kansas Unmarked Burial Sites Preservation Board. These authorities would determine if the remains are human. If human remains are discovered, qualified experts could determine if the site is part of a modern crime scene or an older burial, as well as the race and approximate age of the remains.

- The Prairie Band Potawatomi Nation, in a letter dated March 3, 2003, (see **Appendix I, Section G, Item 5**), provided KCD with comments to the Final EIS.

The Tribe provided the following comments:

- 1) The project would have a significant impact on the cultural, historical, religious and environmental aspects of affected areas, in contravention of the Corps' duties under NEPA and NHPA.
- 2) The KCD failed to consult with the ACHP, the Secretary of the Interior, and others regarding impacts to historic properties.
- 3) The KCD's Determination of Effect does not account for potential effects of the undertaking on the William Meairs Farmstead, a property determined eligible for listing on the National Register of Historic Places.
- 4) The KCD failed to conduct a meaningful investigation to determine if Baker Wetlands is eligible for listing on the National Register of Historic Places as a Traditional Cultural Property.
- 5) The KCD did not conduct a meaningful investigation to determine if unmarked human burials are present in Baker Wetlands.
- 6) The KCD failed to consult with the Tribe regarding: 1) the Tribe's knowledge of burials in the wetlands; 2) KCD's program to preserve and protect historic properties; 3) construction costs estimated for the 42nd Street alignment; and 4) other issues related to the Tribe's letters.
- 7) The KCD did not provide the Tribe with sufficient time to present the views of tribal elders.

- 8) In a meeting between Robert Smith, KCD Project Manager, and Carol Brown, Counsel for the Tribe, Mr. Smith stated that personal interviews provided by tribal elders would not affect KCD's final decision.
- 9) The KCD did not adequately consider the project's impact on the Haskell Institute Historic District.
- 10) The Final EIS fails to meet NEPA requirements.
- 11) Mitigation measures for the Selected Alternative do not adequately address the significant impacts that will occur to the Wakarusa River ecosystem, including Baker Wetlands and the Wakarusa River floodplain.
- 12) The Final EIS violates NEPA requirements for analyzing cumulative impacts on the Wakarusa River.
- 13) Implementation of mitigation measures is uncertain and based upon unwarranted assumptions.
- 14) The Final EIS fails to include scientific citations to support its conclusions.
- 15) The Final EIS contravenes the statement of purpose and need for the project.

KCD Response.

- 1) The KCD is satisfied that it has properly discharged its responsibilities under NEPA and NHPA.
- 2) The KCD consulted with all appropriate parties in an effort to address issues relating to historic properties. Comments were requested from all Federally-recognized tribes on February 6, 2002, and again on March 25, 2002, to identify issues of concern to Native Americans. In addition, 29 Kansas homeland and reservation tribes were invited to participate in government-to-government consultation with KCD in an effort to address issues of importance to the tribes. On November 20, 2002, KCD provided the SHPO with a Determination of Effect, which addressed historic properties located within the project area, and a proposed mitigation plan to resolve adverse effects to such properties. The NPS (the Secretary of the Interior's representative in this matter), ACHP, twenty-nine Kansas homeland and reservation tribes, and all other Federally-recognized tribes and other parties that had expressed an interest in Section 106 issues were provided with a copy of KCD's letter to the SHPO and were invited to submit comments. In a letter dated December 4, 2002, the SHPO concurred with KCD's findings. On February 19, 2003, a Draft MOA, to resolve adverse effects to historic properties, was provided to the SHPO, ACHP, 29 Kansas homeland and reservation tribes, and all other Federally-recognized tribes and other parties that had expressed an interest in Section 106 issues relating to the project. All recipients of the Draft MOA were invited to provide comments to KCD. The MOA was executed on June 6, 2002, with concurrence by all Signatories and Invited Signatories, which included the ACHP.
- 3) The William Meairs Farmstead is located outside the Selected Alternative's Area of Potential Effect. Therefore, it was not addressed in KCD's Determination of Effect. See **Volume 1, Section 2.8.3, of the Final EIS.**
- 4) See KCD's Response 3) above to the Mandan, Hidatsa and Arikara Nation's March 3, 2003, letter in **Section 2.1.a.**
- 5) See KCD's Response above to the Tribes second February 14, 2003, letter.
- 6) The KCD formally met with the Tribe to consult on a government-to-government basis on April 26, 2002, and again on October 1, 2003. Consultation with the Tribe

continued until execution of this ROD. The Tribe's attorneys and others were repeatedly informed by KCD that information provided regarding unmarked burials in Baker Wetlands could not be substantiated and that such information should be reported to local law enforcement authorities, as required by Kansas State law (Kansas Unmarked Burial Sites Preservation Act). See KCD's Response 2) above for a discussion of KCD's efforts to obtain comments concerning historic properties and other issues of concern to the Tribe. Information requested by the Tribe concerning estimated construction costs for the 42nd Street alignment has been provided to the Tribe, where such information is available to KCD. The KCD provided a written response to the Tribe's December 27, 2002, and February 14, 2003, letters on June 12, 2003, (see **Appendix I, Section G, Item 10**).

7) The KCD expressed an interest in meeting with tribal elders as early as May of 2002. See **Appendix I, Section H, Item 2**, for a December 17, 2002, letter from KCD to the Tribe, which describes KCD's efforts to meet with tribal elders.

8) Ms. Brown's affidavit does not accurately represent the dialog between Mr. Smith and Ms. Brown. Mr. Smith informed Ms. Brown that based on over 2,000 comment letters, a public hearing, government-to-government consultation with tribes, and other information collected, KCD had identified a Selected Alternative and was in the process of finalizing the EIS. Mr. Smith further informed Ms. Brown that KCD believes that it has been made fully aware of the Native American community's views regarding the project and that KCD would not reevaluate its decision unless new information was provided that would prompt KCD to reconsider its findings. See **Appendix I, Section G, Item 6**, for KCD's Memorandum for the Record, dated April 8, 2003, for additional information concerning the discussion between Mr. Smith and Ms. Brown.

9) The KCD is satisfied that project-related impacts to historic properties have been properly considered.

10) The KCD is satisfied that the Final EIS meets NEPA requirements.

11) The KCD is satisfied that the mitigation plan developed for the Selected Alternative adequately addresses unavoidable impacts associated with the project.

12) The KCD is satisfied that the Final EIS adequately addresses significant cumulative impacts related to the project.

13) The mitigation plan for this project is focused on compensation for unavoidable impacts associated with the Selected Alternative and is expected to provide substantial long-term benefits and enhancements to Baker Wetlands. Since the mitigation area is within the Wakarusa River's floodplain and is comprised of lands that appear to have historically supported wetlands, wetland mitigation (wetland restoration) is deemed to have a high probability for 100 percent success. Since KDOT has the authority to condemn project lands, acquisition of mitigation properties is not an issue.

14) The statements made and conclusions drawn by KCD in the Final EIS are based on a thorough evaluation of the project based on comments received from agencies, tribes, and the public; information provided by consultants and other experts; field visits to the project site; and KCD's professional experience, which includes extensive involvement with a broad spectrum of environmental issues.

15) The KCD is satisfied that the Selected Alternative meets the objectives of the project's purpose and need statement.

- The Prairie Band Potawatomi Nation, in a letter dated April 22, 2003, (see **Appendix**

I, Section G, Item 7), provided several comments concerning roadway alignments. See **Appendix I, Section G, Item 10**, for KCD's June 12, 2003, written response to the Tribe's letter.

The Tribe provided the following comments:

1) The 42nd Street alignment bridge length is excessive. The Tribe requests that KCD recompute the estimates for bridge length and cost. The Tribe also requests that KCD discuss all possible alternative measures, which could be used to reduce the length and cost of the bridge.

2) The Tribe requests that KCD meet with them on a government-to-government basis on all issues identified by the Tribe.

KCD Response.

1) This comment is addressed above in KCD's response 3) to the Tribe's December 27, 2002, letter and in KCD's response to the Tribes first February 14, 2003, letter.

2) The KCD's June 12, 2003, written response to the Tribe (see **Appendix I, Section G, Item 10**), requests that the Tribe contact KCD at its earliest opportunity, if it wishes to setup an additional government-to-government consultation meeting.

- The Kansas City District, Kansas Department of Transportation, and the Department of Transportation's consultant HNTB met with Mr. David Prager, the Tribe's attorney, on June 10, 2003, (see **Appendix I, Section G, Item 8**, for a written record of the meeting). The meeting was held at the request of the Tribe to discuss an alternative roadway alignment proposed by the Tribe, which is identified by the Tribe as 42nd Street Alignment C. Mr. Prager provided KCD with a letter dated June 10, 2003, which states the Tribes contention that the eastern 42nd Street Alignment A bridge is too long and too expensive and argues in favor of selection of the Tribe's 42nd Street Alignment C route.

KCD Response.

Mr. Prager was informed during the meeting that the Tribe's proposed alignment is a new issue that should have been discussed prior to completion of the Final EIS and the identification of a Selected Alternative for the project. Mr. Prager was also informed that although cost was an important factor in the final selection of an alternative it was only one of many factors considered by KCD in its determination to select the 32nd Street Alignment B alternative. The Tribe's proposed alignment is discussed below in KCD's response to the Tribe's June 10, 2003, letter.

- The Prairie Band Potawatomi Nation's June 10, 2003, letter (see **Appendix I, Section G, Item 9**), reiterated its position that the eastern 42nd Street Alignment A bridge is too long and too expensive and proposed an alternative alignment identified by the Tribe as 42nd Street Alignment C. The Tribe stated that the 4,300 foot-long eastern bridge on the 42nd Street Alignment A route could be replaced with three bridges with a total length of 2,545 feet using their proposed Alignment C route. According to the Tribe this would reduce bridge costs by \$19,000,000 and would make the cost of the 42nd Street Alignment C approximately the same as the Selected Alternative. The Tribe requested that KCD perform a detailed engineering study and cost estimate for their proposed alignment. The

Tribe also requested that KCD provide them with any information that it has relating to the Tribe's proposed alignment. The Tribe further requested that KCD provide the Tribe with an opportunity to submit comments and questions regarding such information. See **Appendix I, Section G, Item 13**, for KCD's July 16, 2003, written response to the Tribe's letter.

KCD Response. The KDOT has informed KCD that it initially considered a conceptual corridor similar to the roadway alignment proposed by the Tribe. However, crossing the Wakarusa River at its narrowest point was not a KDOT priority. The corridor was not considered a desirable route and was rejected early in KDOT's preliminary review process. The Tribe's proposed route was not considered by KDOT since other 42nd Street alignments with less curvature of the roadway were available for evaluation and were better suited to meet highway design standards. The KDOT provided KCD with a cost estimate of \$123,163,000 for the Tribe's proposed alternative. The cost estimate was developed based on four-lane roads and bridges using the same methods and standards used for the cost estimates presented in **Table 2-18 of the Final EIS**. Based on KDOT's estimate, the alternative would cost approximately \$5,300,000 less than the 42nd Street Alignment A alternative - not \$19,000,000, as stated by the Tribe.

In addition to the information presented above, the Tribe was informed by KCD in its written response, that cost was only one of many factors considered by KCD in its final selection of an alternative. The Tribe was further informed that based on all of the information available to KCD, it is confident that the Selected Alternative best satisfies the overall public interest in this matter. The Final EIS thoroughly discusses the rationale for KCD's selection of the 32nd Street Alignment B alternative.

- The KCD, in a letter dated June 12, 2003, (see **Appendix I, Section G, Item 10**), responded to the Tribe's letters dated December 27, 2002; February 14, 2003 (two letters); and April 22, 2003.
- The Prairie Band Potawatomi Nation, in a letter dated June 13, 2003, (see **Appendix I, Section G, Item 11**), reiterated its position that the eastern 42nd Street Alignment A bridge is too long and too expensive and stated that the Tribe's proposed 42nd Street Alignment C route would cost \$10,000,000 to \$20,000,000 less to construct. See **Appendix I, Section G, Item 13**, for KCD's July 16, 2003, written response to the Tribe's letter

KCD Response.

The rationale presented in the Tribe's letter to support their contention that the Tribe's proposed 42nd Street Alignment C route should be selected as the preferred new roadway alignment is similar to the arguments presented by the Tribe in earlier letters discussed above. See KCD's response above to the Tribe's June 10, 2003, letter.

- The Prairie Band Potawatomi Nation, in a letter dated June 26, 2003, (see **Appendix I, Section G, Item 12**), provided comments to KCD's June 12, 2003, written response to the Tribe. The Tribe also provided comments relating to the June 10, 2003, meeting between Mr. Prager, the Tribe's attorney, KCD, KDOT, and KDOT's consultant HNTB.

The Tribe provided the following comments:

1) The KCD's response to the Tribe's December 27, 2002, letter does not provide a reasonable justification for the Final EIS where the facts, law and a due diligence analysis would favor the Tribe's 42nd Street Alignment C route.

2) Per prior agreement with KCD, the Tribe wishes to amend KCD's June 10, 2003, meeting summary (see **Appendix I, Section G, Item 8**), to reflect corrections to statements made by KDOT and HNTB engineers.

KCD Response.

1) The Tribe's preferences regarding the selection of a route for the new road have been clearly stated to KCD. It is obvious that the Tribe objects to the 32nd Street alignment; however, as stated above by KCD in various responses to the Tribe, KCD is satisfied that, on balance, the Selected Alternative best satisfies the overall public interest in this matter.

2) The KCD agreed to allow Mr. Prager to review the written meeting summary and to amend his comments if he believed that they were not recorded accurately. The KCD did not agree that Mr. Prager could modify statements made by others.

- The KCD, in a letter dated July 16, 2003, (see **Appendix I, Section G, Item 13**), responded to the Prairie Band Potawatomi Nation's letters dated June 10, 2003, and June 13, 2003.

- The Prairie Band Potawatomi Nation, in a letter dated July 18, 2003, (see **Appendix I, Section G, Item 14**), provided comments to KCD's July 16, 2003, written response to the Tribe.

The Tribe provided the following comments:

1) The KCD's July 16, 2003, response to the Tribe's June 10 and June 13, 2003, letters was written by KDOT and HNTB.

2) The Tribe's proposed 42nd Street C alignment was considered by KDOT, HNTB and KCD in 2001, and was omitted from the Draft and Final EIS. The attached Exhibit D, "Area of Potential Effects," dated September 27, 2001, which bears the HNTB logo shows the 42nd Street C alternative as the only 42nd Street alignment.

3) The radius of curvature depicted by KDOT and HNTB for the Tribe's proposed 42nd Street C route was deliberately redrawn and misrepresents the Tribe's alternative.

4) The KDOT and HNTB lied about the assumed 20-foot bridge height above the floodway for the 42nd Street Alignment A route discussed in KCD's letter. In 2001, Mr. Pasley of HNTB stated that the floodway fill requirement is only a three-foot bridge clearance above the 100-year floodway elevation. Adding a water depth of two to four feet and the required three-foot clearance provides a bridge height of only five to seven feet.

5) The Tribe requests that KCD reopen the EIS process with the Tribe's proposed 42nd Street Alignment C as an alternative subject to detailed study.

6) The KCD is required by 40 CFR 1502.14(a) to rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

7) The Tribe has retained a well qualified engineer to provide KCD with expert

engineering information and opinion that will show that the Tribe's proposed 42nd Street Alignment C alternative is a reasonable alternative having a significantly lower cost than the 42nd Street Alignment A alternative.

KCD Response.

1) The KCD requested the assistance of KDOT during the preparation of the subject letter. Many of the issues raised by the Tribe in their letters could not be addressed by KCD without the assistance of KDOT since they related to conceptual plans developed and evaluated by KDOT as part of its standard operating procedure. The KCD carefully reviewed the information provided to KCD by KDOT and has not identified any reason to believe that the information is false or misleading.

2) The Tribe's Exhibit D presents "conceptual corridors" initially developed by KDOT to evaluate possible bypass alignments and to assess potential project-related impacts. The Exhibit does not identify individual alternative roadway alignments as stated in the Tribe's letter. The Exhibit is presented in the Draft and Final EIS as "Concept Corridors," Exhibit II-3. The final 42nd Street alignments identified as reasonable alternatives were routed to avoid Lawrence community parkland, farmsteads, a cemetery, historic properties, and more.

3) The Tribe's proposed alignment was routed through Lawrence community parkland near the route's eastern connection with the existing K-10 Highway. The Tribe's proposal was redrawn to avoid the community's parkland, and to provide a safe approach to the proposed K-10 interchange for east bound traffic and the Wakarusa River floodplain bridges depicted on the Tribe's drawing for west bound traffic. These requirements resulted in increased curvature of the alignment. The KCD is satisfied that the alignment redrawn by KDOT is reasonable and that it reflects appropriate roadway design.

4) The bridge height described in the Tribe's letter references the height of low steel (bottom of the bridge). The height cited by the Tribe does not consider the thickness of the structure, which would determine the elevation of the roadway surface for the bridge. The thickness of the bridge could vary, depending upon bridge type and final design, from approximately five to ten feet. Therefore, assuming a maximum water depth of four feet, two feet of clearance above the water surface, and a bridge thickness of five to ten feet, the roadway surface would be a minimum of eleven feet above the water surface and a maximum near sixteen feet. This height is substantially greater than the height calculated by the Tribe. The KCD is satisfied that the assumed height for KDOT's conceptual plans is reasonable given the early design stage for the project.

5) The Tribe did not propose its 42nd Street Alignment C route until after completion of the Final EIS for this project. After completion of the EIS the Tribe began to submit letters to KCD stating that its proposed 42nd Street Alignment C route is a superior alternative that should be selected as the bypass route. The KCD does not consider the proposed route to be a desirable alternative. The information presented by the Tribe to support its claim that the route should be preferred above all other alignments does not support such a statement. **The KCD has considered the Tribe's request and justification for reopening the comment period for this project in order to allow public review of its proposal. The KCD finds no justification for implementing the Tribe's request. Such action would initiate review of a proposal that KCD has determined is not a desirable alternative,**

would require preparation of a Supplemental EIS, and would create substantial and unwarranted delay for a final decision.

6) A very large number of alternatives could be considered for this project by reshaping the proposed alignments or by moving alignments laterally across the floodplain in an effort to identify every conceivable alternative route. Such efforts are not anticipated, encouraged, or required under NEPA. The EIS addresses five potential roadway corridors and twelve reasonable individual alternative alignments within those corridors. Two reasonable alternatives are identified within the 42nd Street corridor. The two 42nd Street alternatives considered in the EIS, alignments A and B, represent reasonable alternatives within the corridor that achieve the purpose and need for the project, and are practical and feasible from an economic and technical perspective (see **Chapter 2 of the Final EIS**). The KCD is satisfied that the identification and discussion of reasonable alternatives within the EIS meets both the spirit and intent of NEPA implementing regulations.

7) Comment noted.

- The Prairie Band Potawatomi Nation, in a letter dated July 22, 2003, (see **Appendix I, Section G, Item 15**), states that the costs developed for the 42nd Street alignments evaluated by KCD are in error due to the use of incorrect bridge widths. See **Appendix I, Section G, Item 22**, for KCD's September 22, 2003, written response to the Tribe's letter.

The Tribe provided the following comments:

1) Although the final design for future construction appears to be twin two-lane bridges, the current cost estimates are based on single four-lane mainline bridges. Further, it is not necessary or appropriate to compute EIS costs based upon building both of the two-lane mainline bridges when the bypass system of pavement is being constructed with only two lanes of pavement. There are no material economies of scale or justifications for building both two-lane bridges at the same time, especially when only one will be used. Therefore, the 42nd Street Alignment A and 32nd Street Alignment B bridge cost estimates in the EIS must be revised to use single two-lane bridges. Please confirm that current cost estimates are based on four-lane mainline bridges.

2) Please confirm that the attached bridge length and width information (provided by the Tribe) was used for the current EIS cost estimates or provide a schedule showing a breakdown of the bridge length and width figures you believe were used in arriving at the EIS costs.

3) In our June 13, 2003, letter to KCD, we asked for additional information to explain how Table 2-18 of the Final EIS was developed. The KCD did not provide an answer to this question with its June 16, 2003, letter.

KCD Response.

1) No final bridge design was available for any of the alternative roadway alignments considered when KCD initiated preparation of the EIS. Estimated bridge costs were based on construction of single four-lane bridges (lower construction costs than twin two-lane bridges). Since cost estimates for the 32nd Street Alignment B alternative and the 42nd Street Alignment A alternative are based on the same criteria (single four-lane bridges and four-lane roads), KCD is satisfied that the estimates are reasonable and suitable for their comparative purpose in the EIS. The KCD's July 16, 2003, letter to the Tribe (see

Appendix I, Section G, Item 13), states that the comparative construction, operation, and maintenance costs presented in **Volume 1, Section 2.8.4, of the Final EIS** reflect costs based on four-lane roads (**four-lane roads and four-lane bridges**). The KCD's letter notes that the cost estimates presented in **Volume 2, Appendix A-2, of the Final EIS** are for two-lane construction in a four-lane right-of-way. The estimated project costs presented in Appendix A-2 were carried forward from early conceptual plans and are not discussed in Volume 1 of the Final EIS. **The scope of analysis for the EIS includes all anticipated phases of the project for which KCD has control and responsibility under Section 404 of the Clean Water Act. Since KDOT's Section 404 permit application requests authorization to construct a "four-lane freeway," KCD has conducted its public interest review based on the ultimate construction of a four-lane road.** Therefore, cost estimates for the 42nd Street Alignment A and 32nd Street Alignment B bridges will not be revised to reflect the cost of constructing two-lane bridges and roads, as requested by the Tribe.

2) The bridge length and width information provided by the Tribe does not accurately reflect the data used by KDOT to develop cost estimates. Correct data was provided to the Tribe on September 22, 2003, as an enclosure to a KCD written response to the Tribe (see **Appendix I, Section G, Item 22**).

3) The KCD provided the Tribe with the requested information (four-lane cost comparisons) in its July 16, 2003, letter (see **Appendix I, Section G, Item 13**).

- The Prairie Band Potawatomi Nation, in a letter dated July 28, 2003, (see **Appendix I, Section G, Item 16**), states that the costs for the Tribe's proposed 42nd Street Alignment C route, which are presented in KCD's June 16, 2003, written response to the Tribe, are incorrect.

The Tribe provided the following comments:

1) The KCD's June 16, 2003, letter (should read July 16, 2003, letter) to the Tribe states that the Tribe's proposed 42nd Street Alignment C route would result in a savings of approximately \$5,300,000 over the 42nd Street Alignment A route. The attached schedules (Exhibit A, pages 6-9) that were apparently used to arrive at your cost estimate (cost savings) have major errors. Your cost schedule erroneously uses surfacing costs for a four-lane road. This alone has caused the \$123,163,000 cost for the Tribe's proposal to be overstated by at least \$8,000,000. On the other hand the Final EIS cost for the 32nd Street Alignment B (\$110,200,000) uses surfacing costs for a two-lane road.

2) Your 42nd Street Alignment C cost schedule (Exhibit A, Page 7) has also increased the 42nd Street alignment cost presented in the Final EIS for excavation/borrow/clearing and grubbing from \$100 per foot in the EIS to \$150 in your cost schedule. This has erroneously inflated your 42nd Street Alignment C cost estimate by an additional \$1,908,550. In summary, your \$123,163,000 cost estimate for the Tribe's proposed 42nd Street alignment is overstated by \$10,000,000.

3) Because the bypass will be constructed as a two-lane system, it is not appropriate to show costs in the EIS for the alternatives using four-lane mainline bridges.

KCD Response.

1) The KCD's July 16, 2003, letter states that **Volume 1, Section 2.8.4 (Table 2-18)**, of

the Final EIS reflects alignment costs based on four-lane roads (**four-lane roads and four-lane bridges**). The \$110,200,000 cost estimate for 32nd Street Alignment B is based on a four-lane road with four-lane bridges. The cost estimates presented in Table 2-18 in the Final EIS and for the Tribe's proposed 42nd Street Alignment C route were developed and compared using the same methods and standards (**four-lane roads and bridges**).

2) As stated above, the 42nd Street Alignment C cost schedule presented in KCD's letter reflects costs for a four-lane bypass consistent with the cost estimates presented in Table 2-18 in the Final EIS. The cost estimates presented in Table 2-18 are calculated using \$150 per foot for excavation/borrow/clearing and grubbing, not \$100, as stated in the Tribe's letter. The KCD is not aware of any information that indicates that the \$123,163,000 cost estimate for the Tribe's proposed route is incorrect.

3) The bypass is intended to ultimately function as a four-lane highway system and may be initially constructed as four lanes or phased in stages from two lanes to four. Therefore, the Final EIS (**Volume 1, Section 2.8.4, Table 2-18**) provides ultimate design costs for four-lane roads with four-lane bridges. As stated in a KCD response above, the scope of analysis for the EIS includes all anticipated phases of the project for which KCD has control and responsibility under Section 404 of the Clean Water Act. Since KDOT's Section 404 permit application requests authorization to construct a "four-lane freeway," KCD has conducted its public interest review based on the ultimate construction of a four-lane road.

- The Prairie Band Potawatomi Nation, in a letter dated July 31, 2003, (see **Appendix I, Section G, Item 17**), informed KCD that the NPS is examining the historic landmark aspects of the Haskell-Baker Wetlands and their integral relationship with the current Haskell Institute National Historic Landmark. The Tribe stated that the Haskell Board of Regents has responded to the NPS through Resolution No. 2003-04, which supports extension of the current Haskell Institute National Historic Landmark to include HINU wetlands and Baker Wetlands. The Tribe noted that the resolution expresses Haskell's opposition to any SLT alignment through the wetlands and a preference for a route south of the Wakarusa River.

KCD Response. See **Section 10.4 in the ROD** for a discussion relating to the proposed expansion of the Haskell Institute National Historic Landmark boundary.

- The Prairie Band Potawatomi Nation, in a letter dated August 5, 2003, (see **Appendix I, Section G, Item 18**), provided KCD with additional information concerning the Tribe's proposed 42nd Street Alignment C route.

The Tribe provided the following comments:

1) The Tribes proposed 42nd Street Alignment C route was considered but then disappeared without any explanation whatsoever from the Draft and Final EIS. Refer to the Tribe's July 18, 2003, letter. Exhibit D of the Tribe's letter shows consideration of the 42nd Street Alignment C Alternative by KDOT in September 2001. Also, Exhibit II-3 of the Final EIS shows continued consideration in the EIS as late as December 2002. Because the EIS does not discuss in any way the Tribe's proposed alternative or the reason why it was eliminated, the EIS does not comply with 40 CFR, Section 1502.14(a) or (b).

2) The use of excessive bridge widths in the EIS has significantly distorted the cost of the alternatives. (See our July 22, 2003, letter.) For example properly using two-lane bridge costs for the 42nd Street Alignment A alternative would reduce the cost of the alternative by \$30,000,000. This would make the 42nd Street Alignment A alternative almost \$7,000,000 less than the 32nd Street Alignment B alternative. (See attached August 5, 2003, expert opinion letter from Mr. Helmer.)

3) Cost savings associated with the Tribe's proposed 42nd Street Alignment C alternative could be used to fund additional mitigation for wetland preservation.

4) The Tribe requests that you reopen the EIS process and conduct all of the proceedings necessary for a supplemental EIS for this project, including a full, objective review of the Tribe's proposed 42nd Street Alignment C alternative and computation of EIS costs using bridges having two lanes instead of four.

KCD Response.

1) See KCD's response 2) above to the Tribe's July 18, 2003, letter. The KCD is satisfied that the EIS meets both the spirit and intent of NEPA implementing regulations.

2) See KCD's response 3) above to the Tribe's July 28, 2003, letter. The Tribe's cost savings are based on utilization of a two-lane road, which is not under consideration by KDOT. In addition, the cost comparison presented by the Tribe's engineer reduces the width of the 42nd Street Alignment A alternative bridges from four lanes to two lanes but fails to reduce the 32nd Street Alignment B alternative bridge widths from four lanes to two lanes. Therefore, the Tribe's cost comparison between the two alternatives is not reasonable or valid. The cost estimates presented in **Table 2-18 of the Final EIS**, \$110,200,000 for the 32nd Street Alignment B alternative and \$128,500,000 for the 42nd Street Alignment A alternative are based on four-lane roads with four-lane bridges.

3) See KCD's response 2) above.

4) See KCD's response 5) above to the Tribes July 18, 2003, letter.

- The Prairie Band Potawatomi Nation, in a letter dated August 15, 2003, (see **Appendix I, Section G, Item 19**), requested an additional government-to-government consultation meeting with KCD.

KCD Response. A second government-to-government consultation meeting was held with representatives of the Tribe on October 1, 2003.

- The Prairie Band Potawatomi Nation, in a letter dated August 19, 2003, (see **Appendix I, Section G, Item 20**), provided KCD with additional information concerning the Tribe's proposed 42nd Street Alignment C route. The letter contained a report prepared for the Tribe by Mr. Ray Helmer, an engineering consultant, which addresses the Tribe's proposed route. The Tribe's letter states that according to Mr. Helmer's August 19, 2003, report, the Tribe's proposed 42nd Street alignment is a reasonable and significant alternative costing \$16,600,000 less than the 42nd Street Alignment A alternative as a result of using shorter bridges over narrower portions of the floodway. Mr. Helmer also states in his report that the Tribe's 42nd Street alternative, as properly drawn, has no indication of material safety, ramping or other problems.

KCD Response. See KCD's responses above to the Tribe's August 5, 2003, letter.

- The Prairie Band Potawatomi Nation, in a letter dated September 16, 2003, (see **Appendix I, Section G, Item 21**), requested copies of all KDOT and HNTB communication with KCD related to the Tribe's proposed 42nd Street Alignment C route. The Tribe requested that the information be provided 10 days prior to an October 1, 2003, consultation meeting with KCD. The Tribe also requested that KCD review past correspondence from the Tribe and respond in writing to the questions presented by the Tribe prior to the upcoming consultation meeting. The Tribe provided KCD with an enclosure to its letter that presents an individual's view of the history of the Haskell-Baker Wetlands.

KCD Response. The KCD provided the Tribe with a letter dated September 22, 2003, (see **Appendix I, Section G, Item 22**), which contained all of the information requested by the Tribe. See the discussion below regarding KCD's September 22, 2003, written response to the Tribe.

- The KCD, in a letter dated September 22, 2003, (see **Appendix I, Section G, Item 22**), responded to the Tribe's September 16, 2003, letter discussed above. The KCD's letter transmitted all of the information requested in the Tribe's letter and noted that additional information had been provided to the Tribe by KDOT, in a letter dated September 15, 2003, (see **Appendix I, Section G, Item 23**). A copy of KCD's letter was Faxed to the Tribe on the date of the letter to ensure that the Tribe had sufficient time to review the information prior to an October 1, 2003, consultation meeting with KCD. The KCD believes that all of the information requested by the Tribe, to date, has been provided to them.
- The Prairie Band Potawatomi Nation, in a letter dated October 1, 2003, (see **Appendix I, Section G, Item 24**), reiterated its support for selection of the Tribe's 42nd Street Alignment C route. The information presented in the Tribe's letter is similar to the information provided by the Tribe in a June 10, 2003, meeting with KCD; and in letters dated June 10, 2003; June 13, 2003; June 26, 2003; July 18, 2003; July 22, 2003; July 28, 2003; August 5, 2003; August 19, 2003; and September 16, 2003, (see the responses above to the Tribe's letters). This letter includes an additional argument that selection of the Tribe's 42nd Street Alignment C route and a phased construction scenario would defer construction costs and would result in a savings of approximately \$7,500,000 in interest.

KCD Response. The Tribe's letter advocates selection of their proposed 42nd Street Alignment C route over all others based on a comparison of the initial construction costs for a two-lane road with single two-lane bridges. The Tribe's argument is based on an assumed construction scenario (phased construction of a four-lane highway utilizing single two-lane bridges during the first phase and construction of a second phase no earlier than 10 to 20 years after completion of the first phase), and cost estimates including interest savings developed by the Tribe. The KCD neither agrees nor disagrees with the assumptions and cost estimates presented by the Tribe in this letter. However, as stated above in responses to earlier letters from the Tribe, the

scope of analysis for the EIS includes all anticipated phases of the project for which KCD has control and responsibility under Section 404 of the Clean Water Act. Since KDOT's Section 404 permit application requests authorization to construct a "four-lane freeway," KCD has conducted its public interest review based on the ultimate construction of a four-lane road. Therefore, KCD's evaluation of alternatives and final selection of a route for the bypass is based on the construction of a four-lane road and does not assume "phased" or "non-phased" construction of the bypass. Although cost is an import factor in KCD's evaluation, it is only one of many factors considered and is not the determining factor in the final decision. The KCD's evaluation concluded that the 32nd Street Alignment B alternative reflects the best overall route when compared to alignments within the 42nd Street corridor. The determining factor in KCD's final decision was the affect on Baker Wetlands from foreseeable cumulative future impacts associated with alignments within the 42nd Street corridor. Refer to Section 5 of the ROD for a discussion of KCD's rationale for the final selection of an alignment for this project.

- The Prairie Band Potawatomi Nation, in a letter dated October 6, 2003, (see **Appendix I, Section G, Item 25**), provided KCD with additional information in support of the Tribe's proposed 42nd Street Alignment C route.

KCD Response. See KCD's response above to the Tribe's October 1, 2003, letter.

- The Prairie Band Potawatomi Nation, in a letter dated November 24, 2003, (see **Appendix I, Section G, Item 26**), informed KCD that the Douglas County Commissioners have approved expansion of the Urban Growth Area for the city of Lawrence to a location south of the Wakarusa River. The Tribe states that the County Commissioners' action makes the Final EIS analysis of the 42nd Street alternative substantially inaccurate. The Tribe also reiterated its request that a Supplemental EIS be prepared to include an evaluation of the Tribe's proposed 42nd Street Alignment C route.

KCD Response. The KCD does not find any merit in the Tribe's statement that the Final EIS analysis of the 42nd Street alternative is substantially inaccurate, nor does KCD find any justification for the Tribe's request for a Supplemental EIS to evaluate the Tribe's proposed 42nd Street Alignment C route. No final decision has been made regarding expansion of the Urban Growth Area for Lawrence. The Douglas County Commissioners' decision to approve expansion of the Urban Growth Area must be adopted by the Lawrence and Douglas County Planning Commission prior to implementation of the plan. Adoption of the plan would not affect KCD's decision to select the 32nd Street Alignment B alternative for this project. Refer to **Section 5 of this ROD** for KCD's evaluation of the two Preferred Alternatives, which resulted in a determination that reasonably foreseeable cumulative future impacts associated with the 42nd Street alignment are likely to be significant and that selection of the 32nd Street alignment best serves the overall public interest in this matter. See KCD's response 5) above to the Tribe's July 18, 2003, request to prepare a Supplemental EIS for this project, and KCD's response above to the Tribe's October 1, 2003, letter, which advocates selection of the Tribe's proposed 42nd Street Alignment C route.

c. **Oglala Sioux Tribe.** The Oglala Sioux Tribe, in a letter dated January 31, 2003, (see **Appendix I, Section G, Item 27**), provided the following comments:

- 1) Items of historical or spiritual value to the Tribe may be present in the alignment of the proposed bypass.
- 2) The Tribe supports the HINU Student Senate and Alumni Association's opposition to the bypass. The Tribe also supports the WPO's opposition to the project. The Tribe supports listing the modern HINU campus and Baker Wetlands on the National Register of Historic Places due to their association with the former Haskell Institute.
- 3) Sacred ceremonies are held on the grounds several times throughout the year by an assortment of tribes and tribal members.

KCD Response.

- 1) Comment noted.
- 2) Comment noted.
- 3) Comment noted.

2.2. Tribal Elders.

- The Prairie Band Potawatomi Nation, in a letter dated December 13, 2002, (see **Appendix I, Section H, Item 1**), expressed concern that a meeting with tribal elders was unlikely to take place prior to completion of the Final EIS. The Tribe stated that KCD had not followed up on its commitment to meet with tribal elders since Col. Curtis, the KCD District Engineer, would not change his schedule to make himself available for a meeting proposed by the Tribe on December 18, 2002, in Tulsa, Oklahoma.

KCD Response. The KCD, in a letter dated December 17, 2002, (see **Appendix I, Section H, Item 2**), responded to the Tribe's December 13, 2002, letter. The KCD outlined its efforts to meet with tribal elders since the spring of 2002, and explained that Col Curtis was unable to change his schedule to accommodate the proposed December 18 meeting. The letter offered four dates in December 2002, on which Col. Curtis would be available to meet with tribal elders. The letter also stated that Col. Curtis would be willing to travel to a reservation for such a meeting. The letter informed the Tribe that Col. Curtis wished to meet with tribal elders prior to completion of the Final EIS in order to include their views in the Final document.

- Mr. Kenneth Bordeaux (Three Eagles), a Native American Consultant and Teton Lakota elder, in a letter dated February 13, 2003, (see **Appendix I, Section H, Item 3**), provided KCD with a history of the persecution of Native Americans as a result of previous Federal Government policies.

KCD Response. Comment Noted.

3. Comments Concerning Section 106 of the National Historic Preservation Act.

3.1. Comments Received in Response to KCD's Determination of Effect and Proposed Mitigation Plan to Resolve Adverse Effects to Historic Properties (see Appendix I, Section

J, Item 1, for KCD's Determination of Effect and Proposed Mitigation Plan).

- The State Historic Preservation Officer, in a letter dated December 4, 2002, (see **Appendix I, Section J, Item 2**), responded to KCD's Determination of Effect and provided the following comments:

"My office concurs with your determinations of No Adverse Effect concerning the H. Eggert Family Property and the discontinuous district on the Haskell campus that is recognized as a National Historic Landmark. Both of these historic properties are located some distance from the proposed 32nd Street Alignment B alternative corridor and would not experience measurable visual or auditory impacts from the proposed undertaking.

We also concur with your determination that the proposed 32nd Street alternative will have an Adverse Effect, pursuant to 36 CFR Part 800.5, on the Haskell Institute Historic District. Such a finding is appropriate considering the physical and visual impacts that the 32nd street Alignment B alternative would have on this historic property.

The Kansas State Historic Preservation Office has reviewed your proposed mitigation measures and finds them to be appropriate for mitigating the adverse effect on the eligible historic district. Throughout our involvement with this project, our office's biggest concern has been 31st Street and its relation to the Haskell Institute Historic District and the proposed 32nd Street Alignment B alternative. If 31st Street were to be left in place, and the proposed trafficway alignment constructed, two traffic corridors would divide the historic district. We agree that it is appropriate to remove 31st street and place it immediately adjacent to the proposed 32nd Street Alignment B alternative. By doing so, there will be only one traffic corridor bisecting the historic district thereby maintaining the condition that exists now. This mitigation proposal will also make the Haskell Indian Nations University's (HINU) property a contiguous unit.

My office supports the mitigation proposals directly related to the construction of the proposed 32nd Street Alignment B alternative. Currently, there is a traffic corridor (31st Street) that bisects the property identified as the Haskell Institute Historic District, and this roadway, and associated traffic, are visible from portions of the HINU campus and portions of the Baker wetlands. In addition, the tree growth that exists along the levee situated on the northern portion of the Baker Wetlands creates a visual barrier between the HINU campus and the Baker Wetlands. The proposal to construct sound walls and plant vegetation along the 32nd Street Alignment B alternative adequately mitigates this alternative's visual impacts on the historic district. There will be no increase in visual disturbances to the historic district, and the mitigation proposal will create conditions that mirror the visual barrier that currently exists between the HINU campus and the Baker Wetlands. The proposed 32nd Street Alignment B alternative also avoids all bridges and water control gate structures that contribute to the historic district. If this alternative is constructed, we ask that its alignment not be altered so that the avoidance of these structures is maintained.

The proposed measure that creates 300 acres of new wetlands and moves Haskell Avenue and Louisiana Street to the east and west, respectively, of their current alignments mitigates another potential problem that my office had identified. Commercial and residential development almost always occurs adjacent to major transportation corridors, and our office was concerned that any resultant development associated with the proposed trafficway would have a negative impact on the rural character of the Baker Wetlands and the southern portion of the HINU campus. The proposal to create these wetlands solves this potential problem by creating a larger spatial buffer around the Baker Wetlands portion of the historic district, thereby ensuring that its natural and rural character will not be impacted.

The Kansas State Historic Preservation Office concurs with all of your determinations of effect and supports the currently proposed mitigation measures. If new mitigation measures are proposed, or if the current ones are altered, during your discussions with other consulting parties, please notify our office so that we may review and comment on them.”

- The National Park Service, in a letter dated December 16, 2002, (see **Appendix I, Section J, Item 3**), provided the following comments:
 - 1) The NPS noted that the Department of the Interior’s Office of Environmental Policy and Compliance had not yet provided KCD with a consolidated response to the Draft EIS. Therefore, the NPS has enclosed comments for consideration.
 - 2) The NPS stated that they are concerned that KCD’s Determination of Effect addresses only one of the two Preferred Alternatives identified in the Draft EIS.
 - 3) The NPS stated that they disagree with KCD’s conclusion that the former Haskell Institute’s agricultural area, while an important element of the District, is of lesser significance because it is “extensive throughout the Baker Wetlands portion of the District and displays very little diversity” compared to the historic structures.
 - 4) The NPS stated that they do not feel that it is appropriate, at this time, to provide further comments on the Determination of Effect or to respond to the proposed mitigation plan.

KCD Response.

- 1) Refer to **Volume 1, Chapter 5, of the Final EIS and Section 1.1.b.** above for a discussion of the NPS comments to the Draft EIS.
- 2) The KCD completed its Determination of Effect based on KDOT’s Section 404 permit application for authorization to construct the bypass on the 32nd Street alignment. If the 42nd Street alignment (the other Preferred Alternative identified in the Draft EIS) would ultimately have been identified as the Selected Alternative, KCD would have proceeded with a Determination of Effect for that alignment. The Final EIS contains a comparison of project-related impacts associated with the two Preferred Alternatives in **Volume 1, Table 2.20**.
- 3) Comment noted.
- 4) Comment noted.

- The Haskell Indian Nations University, in a letter dated December 26, 2002, (see

Appendix I, Section J, Item 4), provided the following comments:

1) The HINU opposes construction of the bypass along the 32nd Street alignment or any other alignment that materially affects the Haskell campus or the area commonly called Baker Wetlands.

2) The HINU disagrees with the assertion that the bypass will not directly impact the 12 NHL properties located on the school's campus.

3) The HINU questions the assertion that outside the "filling of approximately 26 acres of the Historic District in the northern end of Baker Wetlands, the majority of the District would remain relatively undisturbed."

4) The HINU disagrees with the assertion that the elevation of the proposed roadway and its associated structure would not adversely affect the Haskell campus.

5) The HINU questions the environmental impacts of consolidating the bypass and 31st Street into one corridor. If concern for visual impacts to the District is of primary concern, using another corridor farther south would do more than consolidation.

6) The HINU believes that construction of the roadway may serve as a conduit for development, leading to more impacts on the District.

7) The HINU remains skeptical of the assertion that noise studies have shown that construction of the bypass on the 32nd Street alignment would result in less noise than if a 42nd Street alignment or no build alternative were chosen.

8) The HINU appreciates the commitment to relocate 31st Street to the south and the plan to purchase an additional 300 acres of adjacent farmland to support expansion of the wetlands. However, we do not believe that it is sufficient to warrant our support for the construction of six-eight lanes of traffic on our southern border and the impact it will have on Baker Wetlands.

KCD Response.

1) Comment noted.

2) Comment noted.

3) 0Comment noted.

4) Comment noted.

5) Comment noted.

6) Mitigation will create a vegetative buffer on the east and west sides of Baker Wetlands. The mitigation buffer will substantially reduce potential impacts to Baker Wetlands from development within the surrounding area.

7) Comment noted.

8) Comment noted.

- The Advisory Council on Historic Preservation, in letters dated January 2, 2003, informed Lt. General Robert Flowers, Chief of Engineers for the U.S. Army Corps of Engineers (see **Appendix I, Section J, Item 5**), and Colonel Donald Curtis, District Engineer for the Kansas City District, U.S. Army Corps of Engineers (see **Appendix I, Section J, Item 6**), that they have chosen to participate in consultation to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties. The ACHP stated that they have applied Appendix A of their regulations, *Criteria for Council Involvement in Reviewing Individual*

Section 106 Cases, and determined that the undertaking will have substantial impacts on important historic properties, and presents issues of concern to Indian tribes.

KCD Response. Comment noted.

- The Kansas Water Office (KWO), in a letter dated December 5, 2002, (see **Appendix I, Section J, Item 7**), stated that they have statutory authority for addressing wetland and riparian management issues in the Kansas Water Plan, which is contained in the State Water Resources Planning Act (K.S.A. 82a-901 et. Seq.) The KWO commented that it is the responsibility of the permitting authority to make sure proposed projects comply with Kansas laws and policies. The KWO requested that any action undertaken by the Corps regarding this project be consistent with Kansas law and the Kansas Water Plan objectives.

KCD Response. The KCD has coordinated with all appropriate Kansas agencies regarding this project and is not aware of any aspect of this project that would conflict with Kansas state laws or policies.

- Kansas State Representative Ralph Tanner of the Tenth District, in a letter dated December 6, 2002, (see **Appendix I, Section J, Item 8**), stated that the Determination of Effect and mitigation plan are reasonable and fair in addressing the needs of the community and the wishes of the contending parties.

KCD Response. Comment noted.

- Douglas County Commissioner Bob Johnson, in a letter dated December 4, 2002, (see **Appendix I, Section J, Item 9**), stated that the Douglas County Commission has voted in support of the 32nd Street Alignment B alternative for the completion of the South Lawrence Trafficway.

KCD Response. Comment noted.

- The Wakarusa Group, Kansas Chapter of the Sierra Club, in a letter dated December 4, 2002, (see **Appendix I, Section J, Item 10**), provided KCD with a copy of a letter they submitted to the SHPO stating that the WGKCSC opposes the 32nd Street Alignment B alternative because of the project's impact to the site of the former Haskell Institute.

KCD Response. Comment noted.

- Rural Water District No. 4, in a letter dated November 22, 2002, (see **Appendix I, Section J, Item 11**), stated that they concur with KCD's Determination of Effect and mitigation proposal, and support the 32nd Street Alignment B route.

KCD Response. Comment noted.

- The Delaware Nation, NAGPRA Office, in a letter dated November 25, 2002, (see

Appendix I, Section J, Item 12), stated that although the preferred alignment for the bypass will adversely impact the area, the proposed mitigation seems to adequately preserve the most important aspects of the site. The Tribe asked that they be contacted if human remains are uncovered during construction activities.

KCD Response. Kansas state law requires notification to the Kansas Unmarked Burial Sites Preservation Board, if an unmarked burial is discovered. The Board, which consists of nine members, contains one member from each of the four Kansas reservation tribes. The Board is responsible for any actions taken, including notification to other Tribes, in the event of the inadvertent discovery of Native American remains. The KCD does not have jurisdiction in this matter.

- The Southern Ute Indian Tribe, in a letter dated December 16, 2002, (see **Appendix I, Section J, Item 13**), stated that the Tribe believes, at this time, that there are no known impacts to Native American cultural sites that are sensitive to their Tribe so long as NAGPRA regulations are followed during construction. The Tribe further stated that in the event of inadvertent discoveries of Native American sites, artifacts, or human remains, the Tribe would appreciate immediate notification of such findings.

KCD Response. See KCD's response above to the Delaware Nation's November 25, 2002, letter concerning actions to be taken in the event of an inadvertent discovery of Native American remains.

- The Mescalero Apache Tribe, in a letter dated December 9, 2002, (see **Appendix I, Section J, Item 14**), stated that the project will not affect any objects, sites, or locations important to the Tribe's traditional culture or religion.

KCD Response. Comment noted.

- Ziibiwing Cultural Society, in a letter dated January 10, 2003, (see **Appendix I, Section J, Item 15**), stated that, at this time, the Tribe does not have any information concerning the presence of any Indian traditional cultural properties, sacred sites, or other significant properties in the project area.

KCD Response. Comment noted.

- Mr. Kenneth Bordeaux (Three Eagles), in a letter dated December 30, 2002, (see **Appendix I, Section J, Item 16**), stated that he objects to any impacts to the Haskell/Baker wetlands due to their importance to mankind.

KCD Response. Comment noted.

3.2. Comments Received in Response to KCD's Draft Memorandum of Agreement (see Appendix I, Section K, Item 1, for KCD's Draft Memorandum of Agreement).

- The National Park Service, in a letter dated March 12, 2003, (see **Appendix I, Section**

K, Item 3), provided the following comments:

1) The Final EIS incorrectly states that the Keeper of the National Register of Historic Places concurred with KCD's determination that a proposed historic property, identified as the Haskell Institute Historic District, exists within the project area. The Keeper's November 7, 2002, letter states that the site is not eligible for listing as a Historic District, but does state that a site with a similar boundary, identified as the Haskell Agricultural Farm Property, is eligible for listing on the National Register.

2) The NPS strongly suggests that the Draft MOA be revised to specify mitigation efforts, which recognize the importance of the proposed "Haskell Institute Historic District" as contributing to the national significance of the Haskell Institute NHL.

3) In situations involving Federally-sponsored actions on nationally significant resources, mitigation typically involves documentation to Historic American Building Survey/ Historic American Engineering Record Level 1 standards.

4) The NPS suggests that the Final MOA recognize the relationship of the wetlands to the cultural landscape. This could be accomplished by noting the additional wetlands mitigation steps proposed, including construction of the Wetland and Cultural Education Center.

KCD Response.

1) The KCD recognized this error and revised the Final MOA to reference the Haskell Agricultural Farm Property. See **Section 10.1 in the ROD** for a discussion regarding this matter.

2) The purpose of this comment is unclear. As stated by the NPS in their letter, the Keeper of the National Register has determined that the subject area is not eligible for listing as a Historic District. In addition, KCD has determined, and the SHPO has concurred, that the project will not adversely affect the NHL properties located on the HINU campus. Therefore, the Final MOA does not include mitigation to address the subject NHL properties.

3) The Final MOA includes a stipulation that requires KDOT to document the Haskell Agricultural Farm Property features affected by the undertaking, by preparing a permanent record of the features through use of photographs, detailed drawings, and narrative, as appropriate. The Final MOA further stipulates that KDOT must consult with and take direction from the SHPO to ensure preparation of a complete record. The HABS/HAER survey recommended by the NPS is normally required when NHL properties will be affected by an undertaking. Since KCD and the SHPO have determined that the undertaking will not affect an NHL property, the recommended survey method is not appropriate to address the impacts associated with this project. The KCD is satisfied that the stipulations presented in the MOA will ensure that appropriate documentation is prepared by KDOT.

4) The Haskell Agricultural Farm Property consisted of pasture and row crops during the period of its use by the Haskell Institute. The Haskell Institute constructed levees, tile fields, drainage canals, and w-ditches to drain the land. The KCD does not believe that the existing man-made wetland and open water complex, known as Baker Wetlands, contributes to the cultural landscape. Therefore, the Final MOA does not recognize that relationship.

- The Bureau of Indian Affairs, Southern Plains Regional Office, in a letter dated March 14, 2003, (see **Appendix I, Section K, Item 4**), informed KCD that they respectfully decline to participate as a Concurring Party to the MOA. They stated that the offer to participate in preparation of the MOA should be provided to the Bureau of Indian Affairs, Office of Indian Education Programs.

KCD Response. A Copy of the Draft MOA was also provided to the BIA's Office of Indian Education Programs. Mr. Robert McCarthy, Field Solicitor for the Department of the Interior, informed KCD on April 17, 2003, (see **Appendix I, Section K, Item 5**), that the BIA does not have any comments concerning the Draft MOA and does not wish to be a Concurring Party or to participate further in the preparation of the document. The BIA signature block has been removed from the Final MOA, as requested.

- The U. S. Natural Resources Conservation Service, in a letter dated March 7, 2003, (see **Appendix I, Section K, Item 6**), stated that the proposed MOA does not change the Prime Farmland Conversion scores that were assigned to the route alternatives provided to them in November of 2002. They further stated that, at this time, they have not identified any negative environmental effects that the MOA would have on any concerns that they are responsible for evaluating.

KCD Response. Comment noted.

- The State Historic Preservation Officer, in a letter dated February 24, 2003, (see **Appendix I, Section K, Item 7**), provided the following statement:

"The Kansas State Historic Preservation Officer has received and reviewed your correspondence dated February 19, 2003, which contained a Draft Memorandum of Agreement (MOA). On December 4, 2002, our office stated in writing that we thought the mitigation measures proposed to resolve the project's adverse effect on the Haskell Institute Historic District were appropriate. After reviewing the Draft MOA, it is our opinion that the proposed mitigation measures are appropriately incorporated into its stipulations. Therefore, we have no objections to the Draft MOA in its current form."

KCD Response. Comment noted.

- The Kansas Department of Transportation, in a letter dated March 11, 2003, (see **Appendix I, Section K, Item 8**), provided the following proposed changes to the Draft MOA:

1) Section III of the MOA stipulates that KDOT will ensure that mitigation wetlands will remain wetlands in perpetuity. In order to provide the best opportunity for these wetlands to prosper, KDOT has executed an agreement with Baker University and Douglas County that will transfer the ownership and operation of the mitigation wetlands to Baker University. Because KDOT will not be in a legal position to ensure that the mitigation wetlands will remain wetlands in perpetuity, KDOT requests that the last sentence in Stipulation III be removed and replaced with the following statement:

“Prior to transfer of the 304 acres of mitigation wetlands to Baker University, KDOT agrees to convey a conservation easement in accordance with K.S.A. 58-3810, et. Seq., on that property to limit its future use to those consistent with this agreement.”

2) The KDOT is very concerned about safely accommodating the potentially large number of observers permitted by Section XII within the restricted area of the construction site. The KDOT requests that the following language be added to the end of the last sentence in Stipulation XII:

“... subject to the right of KDOT to limit the number of monitors on site to two per day and to impose such further safety restrictions on monitors as it deems to be appropriate. Nothing in this stipulation shall require construction activities to be delayed due to the inability of monitors to attend on any given day.”

KCD Response.

1) The substance of KDOT’s requested change to the Draft MOA has been incorporated into Stipulation No. 4 of the Final MOA.

2) The substance of KDOT’s requested change to the Draft MOA has been incorporated into Stipulation No. 13 of the Final MOA. The total number of tribal monitors allowed on site at any given time has been limited to five in the Final MOA.

- The Kansas Department of Wildlife and Parks, in a letter dated March 5, 2003, (see **Appendix I, Section K, Item 9**), stated that previous comments provided by them have addressed their environmental concerns related to this project. They further stated that, at this time, they have no additional comments regarding the project.

KCD Response. Comment noted.

- The Board of County Commissioners, Douglas County, Kansas, in a letter dated February 26, 2003, (see **Appendix I, Section K, Item 10**), stated that the stipulations identified in the Draft MOA are consistent with the understanding of the Douglas County Commission when it voted in support of the 32nd Street Alignment B route for the bypass.

KCD Response. Comment noted.

- Mr. Charles Jones, a Douglas County Commissioner, provided KCD with an electronic mail transmittal, dated March 11, 2003, (see **Appendix I, Section K, Item 11**), which contained an original message submitted by Mr. Jones to the ACHP on March 4, 2003. The transmittal contained two attachments consisting of comments previously submitted to KCD regarding the Draft EIS and an agreement between KDOT, Douglas County, and Baker University that was not subject to review, comment, or participation of any kind by KCD.

Mr. Jones provided the ACHP with the following comments:

- 1) The ACHP should withhold its support for the 32nd Street alignment and should not

participate as a Signatory to the MOA.

2) The 32nd Street alignment will exacerbate traffic problems in Lawrence, while the 42nd Street alignment will take away more surface traffic than it would add.

3) The 42nd Street alternative will be better aligned to handle the future traffic needs of the community than the 32nd Street alignment.

4) The MOA does not include the city of Lawrence as a Signatory. The exclusion raises serious questions about the viability of the Agreement, since several city streets must be realigned to accommodate construction of the bypass.

KCD Response.

1) Comment noted.

2) The KCD is not aware of any traffic studies or other technical information that support Mr. Jones' statement that the 32nd Street alignment will exacerbate traffic problems in Lawrence.

3) The bypass is not intended to convey local traffic. The bypass is intended to provide a high speed, limited access freeway for K-10 Highway traffic currently routed on city streets.

4) The "Invited Signatories" to the MOA are limited to those parties that have an active role to ensure success of mitigation efforts. The Kansas Department of Transportation is responsible for funding and participating in the design and construction of mitigation areas. Douglas County must relinquish its easement for the section of 31st Street located on HINU property to allow the land to be returned to the school. Douglas County must also relinquish ownership of the Santa Fe Wetland Mitigation site to KDOT for incorporation into the project's wetland mitigation area. Baker University will ultimately assume ownership of wetland mitigation properties and will be responsible for participating in design, construction and maintenance of those properties to ensure compliance with mitigation requirements. The city of Lawrence assumes a passive role in this process and will have no active role to ensure success of mitigation efforts. The KCD is satisfied that the criteria for selection of "Invited Signatories" to the MOA meets the spirit and intent of Section 106 of the National Historic Preservation Act.

- The Board of County Commissioners, Douglas County, Kansas, in a letter dated March 11, 2003, (see **Attachment I, Section K, Item 12**), provided the ACHP with the County Commission's position regarding statements made by Commissioner Jones in his March 11, 2003, letter to the ACHP (see Commissioner Jones' letter above). The County Commission stated that the Lawrence City Commission did not vote in opposition to the 32nd Street Alignment B alternative, as stated by Commissioner Jones in his letter to the ACHP. The County Commission noted that the Mayor of Lawrence and Chairperson for the Lawrence-Douglas County Metropolitan Planning Commission spoke in favor of the 32nd Street Alignment B alternative at a public hearing conducted by KCD to address the project. The County Commission also stated that there has never been majority support for construction of the bypass on an alignment south of the Wakarusa River and asked the ACHP to support the MOA.

KCD Response. Comment noted.

- Baker University, in a letter dated March 11, 2003, (see **Appendix I, Section K, Item 13**), stated that the terms and conditions of the MOA are satisfactory to them.

KCD Response. Comment noted.

- Haskell Indian Nations University contacted KCD by phone on March 11, 2003, (see **Appendix I, Section K, Item 14**), to inform KCD that HINU does not wish to participate as a Concurring Party to the MOA.

KCD Response. The HINU signature block has been removed from the Final MOA, as requested.

- The Wakarusa Group Sierra Club, in an electronic mail transmittal dated March 6, 2003, (see **Appendix I, Section K, Item 15**), provided the following comments:
 - 1) The WGSC objects to the 32nd Street alignment because of Baker Wetlands historic significance to Native Americans.
 - 2) The 32nd Street alignment will block access to the Historic District from HINU. Access to the District will be provided from only one point (near the Wakarusa Fire Station) north of the bypass.
 - 3) The MOA does not allow HINU to address removal of 31st Street from its property, which it has opposed by letter.
 - 4) The HINU will have no opportunity to provide input of any kind concerning the operation of wetlands designed to mitigate the loss of part of its Historic District.

KCD Response.

- 1) Comment noted.
- 2) Two pedestrian paths will be provided for HINU students and other pedestrians to enter Baker Wetlands from areas north of the bypass. One access point will be located east and one access point will be located west of HINU. These paths will provide students and other pedestrians with a safe route that will not expose them to traffic. See **Exhibit 4 of this ROD** for a mitigation plan showing the anticipated locations of pedestrian access points and paths.
- 3) The KCD is not aware of any opposition by HINU to removal of 31st Street if the bypass is constructed on the 32nd Street alignment.
- 4) The HINU has not provided KCD with any comments concerning the proposed mitigation plan. In addition, HINU has asked that KCD remove its signature block from the MOA.

- The Southern Ute Indian Tribe, in a letter dated February 26, 2003, (see **Appendix I, Section K, Item 16**), stated that the Tribe concurs with the stipulations contained in the Draft MOA.

KCD Response. Comment noted.

- The Creek Nation of Oklahoma, in a letter dated February 27, 2003, (see **Appendix I,**

Section K, Item 17), stated that after reviewing Sections X, XI, and XII of the MOA their office concurs that the necessary procedures have been covered in case of the discovery of culturally significant artifacts and/or human remains.

KCD Response. Comment noted.

- The Ziibiwing Cultural Society, in a letter dated March 4, 2003, (see **Appendix I, Section K, Item 18**), stated that, at this time, the Tribe does not have any information concerning the presence of any Indian traditional cultural properties, sacred sites, or other significant properties within the projected project area.

KCD Response. Comment noted.

- The Omaha Tribe of Nebraska, in a letter dated March 10, 2003, (see **Appendix I, Section K, Item 19**), stated that the Tribe has occupied the geographic area of the project at some time in the past. The Tribe further stated that they do not have any immediate concerns that the project will discover any evidence of their occupation of the area.

KCD Response. Comment noted.

- The Leech Lake Band of Ojibwe, in a letter dated March 19, 2003, (see **Appendix I, Section K, Item 20**), stated that the Tribe does not have any concerns related to the project regarding sites of religious or cultural importance. The Tribe also stated that they concur with the determinations of the Kansas State Historic Preservation Office and agree that the proposed project would have an adverse effect to the Haskell Institute Historic District. The Tribe further stated that they believe that the stated mitigation measures are appropriate.

KCD Response. Comment noted.

- Mr. Kenneth Bordeaux (Three Eagles), in a letter dated March 5, 2003, (see **Appendix I, Section K, Item 21**), stated that he does not agree with KCD's Determination of Effect, the SHPO's concurrence, or the Draft MOA. Mr. Bordeaux reiterated his opposition to any roadway alignment that would impact the site of the former Haskell Institute.

KCD Response. Comment noted.



US Army Corps
of Engineers®
Kansas City District

SECTION 404(b)(1) EVALUATION Kansas Highway 10 Relocation (South Lawrence Trafficway)

December 2003

Permit Application Number: 200101697

Applicant: Kansas Department of Transportation

Environmental Impact Statement: Titled, "*Final Environmental Impact Statement – Section 404 Permit Application – by – Kansas Department of Transportation – K-10 Highway (South Lawrence Trafficway)*," prepared by the U.S. Army Corps of Engineers, Kansas City District, dated December 2002

Section 404(b)(1) Evaluation: The subject activity has been evaluated in accordance with guidelines developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army, and published at 40 CFR 230. The following discussion addresses adverse impacts, individually and cumulatively, for all evaluation factors identified in Subparts C through H of the subject regulation.

1. Physical and Chemical Characteristics (Subpart C):

1.1. Substrate: Construction of the relocated section of highway will result in the placement of fill material in approximately 60 acres of waters of the U.S. Fill material will consist of crushed rock and other earthen materials placed for roadway bedding, and concrete, ferrous and earthen materials for bridge construction at stream crossings. Substrate impacts are primarily related to direct losses resulting from the placement of fill materials. See **Section 4.16 in Volume 1** of the Final EIS for additional information.

1.2. Suspended Particulates and Turbidity: The project will increase suspended particulates and turbidity in streams and open water areas. Increases will result from the placement of fill materials and from runoff emanating from construction areas. Such increases are not expected to be significant due to implementation of Best Management Practices and conditioning of the Section 404 permit document to reduce impacts to minimal levels. The introduction of traffic-related suspended particulates and turbidity into waters of the U.S. is not expected to be significant, nor is it expected to be substantially different from conditions created by other highway projects. Roadway runoff from the section of highway passing through Baker Wetlands will be directed into roadside ditches and routed off the property to

prevent contamination of the wetland complex. See **Sections 4.11 and 4.16 in Volume 1** of the Final EIS for additional information.

Note: Water Quality Certification has been issued for this project by the Kansas Department of Health and Environment. The Certification contains conditions to minimize water quality impacts associated with the work to ensure that the project does not violate Kansas Water Quality Standards.

1.3. Water Column Impacts: No significant impacts to the water column have been identified. Impacts to water clarity, nutrient and chemical content, physical and biological content, dissolved gas levels, pH, and temperature will be minimal. See **Section 4.11 in Volume 1** of the Final EIS for additional information.

Note: Water Quality Certification has been issued for this project by the Kansas Department of Health and Environment. The Certification contains conditions to minimize water quality impacts associated with the work to ensure that the project does not violate Kansas Water Quality Standards.

1.4. Current Patterns and Water Circulation: No significant impacts to current patterns and water circulation have been identified. The project will not impact the Wakarusa River floodway and will have minimal adverse impact on surface flows within the floodplain. Physical modifications associated with the work to the confluence of Naismith Creek and the Wakarusa River are expected to reduce current flooding problems north of 31st Street. A reduction in the height of the section of the Baker Wetland levee located parallel and adjacent to Louisiana Street is expected to improve storm water sheet flows through the floodplain and into Baker Wetlands from areas west of Louisiana Street. No bridges will be constructed in or across the Wakarusa River. The relocated highway will not measurably affect water circulation within Baker Wetlands since an east/west levee parallel and adjacent to 31st Street prevents drainage from entering the wetland from areas north 31st Street. See **Section 4.12 in Volume 1** of the Final EIS for additional information.

1.5. Normal Water Fluctuations: The project will have minimal impact on water fluctuations within the project area.

1.6. Salinity Gradients: The project will not impact salinity gradients.

2. Biological Characteristics (Subpart D):

2.1. Threatened and Endangered Species: No impacts to threatened or endangered species have been identified. See **Section 4.15** in the Final EIS for additional information.

2.2. Fish and Other Aquatic Organisms: Fill activities associated with construction of the relocated highway will displace approximately 60 acres of wetlands and open water, which will result in an immediate direct loss of approximately 60 acres of aquatic habitat. Although direct losses associated with the project are significant, the cumulative long-term impact to fish

and other aquatic organism will be substantially less than the impacts associated with the other alternative roadway alignments evaluated for this project.

2.3. Other Wildlife: Construction of the relocated highway will result in a loss of habitat for terrestrial and avian wildlife. The work will create a physical barrier (noise walls) through Baker Wetlands, which will prevent mammals and other wildlife from moving across the highway corridor. Sections of the relocated highway east and west of Baker Wetlands are likely to increase wildlife mortality (road kill) in the area due to collisions with vehicles. The project is not expected to significantly impact wildlife populations. See **Response 7** to the Jayhawk Audubon Society's February 14, 2003, letter in **Section 1.4.b of Enclosure 1** in the Record of Decision for additional information.

3. Special Aquatic Sites (Subpart E):

3.1. Sanctuaries and Refuges: The project will not impact sanctuaries or refuges. See discussion of the Baker Wetland National Natural Landmark in **Section 4.5 below**.

3.2. Wetlands: The project will result in the direct loss of approximately 57.6 acres of wetlands (Approximately 52.6 acres in Baker Wetlands and 5 acres in other areas impacted by the project. Although direct wetland losses associated with the project are significant in Baker Wetlands, the cumulative long-term impact to Baker Wetlands will be substantially less than the wetland impacts to the property identified for the other alternative roadway alignments evaluated for this project. Compensatory mitigation was not considered during the Section 404(b)(1) alternatives analysis. See **Volume 1, Sections 2.10 and 4.13** of the Final EIS and **Section 5.2 of Enclosure 1** in the Record of Decision for additional information.

3.3. Mud Flats: No impacts to mud flats have been identified.

3.4. Vegetated Shallows: The project will impact vegetated shallows. The exact acreage of vegetated shallows has not been calculated but is included in the 57.6 acres of wetlands that will be impacted by this project.

3.5. Coral Reefs: The project will not impact coral reefs.

3.6. Riffle and Pool Complexes: No impacts to riffle and pool complexes have been identified.

4. Human Use Characteristics (Subpart F):

4.1. Municipal and Private Water Supplies: The project will not impact municipal and private water supplies.

4.2. Recreational and Commercial Fisheries: The project will have minimal impact on recreational and commercial fisheries.

4.3. Water-Related Recreation: The project will have an impact on water-related recreation. Recreational users of Baker Wetlands may experience undesirable visual and audible impacts in areas near the highway corridor. However, overall recreational use of Baker Wetlands will experience a substantially higher level of degradation for the other alternative roadway alignments evaluated for this project due to the cumulative long-term impacts associated with those alignments. See **Section 5.2 of Enclosure 1** in the Record of Decision for additional information.

4.4. Aesthetics: The relocated highway will diminish aesthetic values along the project corridor. Such impacts will be most severe along the section of highway passing through Baker Wetlands. The overall aesthetic impact of the relocated highway will not be substantially greater than such impacts associated with the other alternative roadway alignments evaluated for this project due to the cumulative long-term impacts from development associated with those alignments. See **Section 5.2 of Enclosure 1** in the Record of Decision for additional information.

4.5. Parks, National and Historic Monuments, National Seashores, Wild and Scenic Rivers, Wilderness Areas, Research Sites and Similar Preserves: Baker Wetlands is a National Natural Landmark and is listed on the National Register of Historic Places as part of a site identified as the Haskell Agricultural Farm Property due to its prior association with the Haskell Institute, an early Native American boarding school. The project will directly impact 52.6 acres of land within the sites. The impact of the relocated highway on the properties will not be substantially greater than the impacts associated with the other alternative roadway alignments evaluated for this project due to the cumulative long-term impacts from development associated with those alignments. A Memorandum of Agreement to resolve adverse effects to the Haskell Agricultural Farm Property has been executed by the Kansas City District, Kansas Department of Transportation, Baker University (property owner), Douglas County, the State Historic Preservation Officer, and the Advisory Council on Historic Preservation. See **Volume 1, Sections 2.11.2 and 4.6** of the Final EIS, and **Sections 5.2 and 10.3.b of Enclosure 1** in the Record of Decision for additional information.

5. Contaminant Evaluation and Testing (Subpart G):

5.1. Evaluation of Dredged or Fill Material: Fill material for this project will consist of stone bedding in that section of the alignment passing through Baker Wetlands, soils obtained from right-of-way cuts for sections of the alignment located outside of Baker Wetlands, and other materials suitable for construction activities in an aquatic environment. Fill materials will be free of chemical, biological, and other pollutants and will not be a carrier of contaminants.

5.2. Chemical, Biological and Physical Evaluation: Based on the evaluation of fill material above there is no reason to suspect that the proposed fill material is a carrier of contaminants. The discharge material meets testing exclusion criteria; therefore, testing will not be required.

6. Actions to Minimize Adverse Effects (Subpart H):

6.1. Actions Concerning the Location of the Discharge: The width of the relocated highway will be the minimum necessary to meet highway safety standards. This requirement will minimize aquatic losses associated with the project

6.2. Actions Concerning the Material to be Discharged: Impacts associated with construction activities will be minimized through implementation of the Best Management Practices specified in the Kansas Department of Health and Environment's Land Disturbance Permit, conditions provided in the Kansas Department of Health and Environment's Water Quality Certification, and conditions provided in the Kansas City District's Section 404 permit for this project. These authorizations must be obtained by the Kansas Department of Transportation prior to initiation of construction activities..

6.3. Actions Controlling the Material After Discharge: Seeding disturbed areas and implementation of other remedial actions stipulated in the authorizations identified in 6.2 above will minimize impacts from the fill material after discharge.

6.4. Actions Affecting the Method of Dispersion: Implementation of the actions stipulated in the authorizations identified in 6.2 above will minimize impacts from dispersion of the fill material.

6.5. Actions Related to Technology: Appropriate technology will be used to minimize project-related impacts.

6.6 Actions Affecting Plant and Animal Populations: Implementation of the actions stipulated in the authorizations identified in 6.2 above will minimize impacts to plant and animal populations. The Kansas City District's Section 404 permit will require creation of a minimum of 304 acres of wetlands to mitigate for wetland habitat losses. See **Volume 1, Section 2.11** of the Final EIS and **Section 6 of Enclosure 1** in the Record of Decision for additional information.

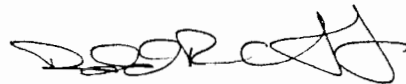
6.7. Actions Affecting Human Use: Implementation of the actions stipulated in the authorizations identified in 6.2 above will minimize impacts affecting human use.

6.8. Other Actions: No additional actions have been identified.

Section 404(b)(1) Guidelines Compliance: As required by Section 404(b)(1) of the Clean Water Act (33 USC 1344), the subject activity has been evaluated in accordance with guidelines developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army, and published at 40 CFR 230. The 404(b)(1) evaluation has resulted in a conclusion that use of the discharge site is not prohibited by 40 CFR 230. There is no less environmentally damaging practicable alternative available to the applicant that meets the purpose and need for the project. The activity does not appear to (1) violate applicable state water quality standards or effluent standards prohibited under Section 307 of CWA; (2) jeopardize the existence of Federally-listed endangered or threatened species

or their habitat; or (3) violate requirements of any Federally designated marine sanctuary. The activity will not cause or contribute to significant degradation of waters of the United States including adverse effects on human health, life stages of organisms dependent on the aquatic ecosystem, ecosystem diversity, productivity and stability, and recreational, esthetic, and economic values. Appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem.

12 December 2003

A handwritten signature in black ink, appearing to read "D. R. Curtis, Jr.", with a stylized flourish at the end.

DONALD R. CURTIS, JR.

Colonel, EN
Commanding



K A N S A S

RODERICK L. BREMBY, SECRETARY

DEPARTMENT OF HEALTH AND ENVIRONMENT

KATHLEEN SEBELIUS, GOVERNOR

December 10, 2003

Mr. Joseph S. Hughes, Chief
Regulatory Branch
U.S. Dept. Army Corps of Engineers
Regulatory Branch
700 Federal Building
Kansas City, MO 64106-2896

RE: Section 401 Water Quality Certification for Public Notice 200101697; Project by Kansas Department of Transportation (commonly known as the South Lawrence Traffic Way) to relocate approximately 7 miles of Kansas Highway 10 to bypass city of Lawrence. The project will consist of grading, construction of bridges and culverts, placement of paving and other related work to complete construction of a 4-lane road. The work will result in the loss of an estimated 55.4 acres of wetlands, impacts to 2,800 linear feet of stream channel and loss of 100 linear feet of stream channel.

Dear Mr. Hughes:

The Kansas Department of Health and Environment has received a request for Section 401 Water Quality Certification. We have reviewed the project and have determined the project has the following water pollutant discharge sources:

1. Construction activities including grading and filling, equipment and materials storage, equipment fueling and maintenance, etc.
2. Loss of wetlands.
3. Loss of riparian vegetation along stream channels.
4. Precipitation runoff from road surfaces
5. Abandoned 31st Street right-of-way
6. Use and operation of the completed roadway

DIVISION OF ENVIRONMENT

Bureau of Water - Watershed Management Section

CURTIS STATE OFFICE BUILDING, 1000 SW JACKSON ST., STE 420, TOPEKA, KS 66612-1367

Voice 785-296-4195

Fax 785-296-5509

<http://www.kdhe.state.ks.us>

Discharges from these sources if not minimized or otherwise controlled may cause surface waters of the state [KAR 28-16-28b(eee)] and specifically the Lower Wakarusa River and Baker Wetlands to violate of the provisions of Kansas Water Quality Standards found at KAR 28-16-28b et seq. Baker Wetlands is designated "special aquatic life use water" [KAR 28-16-28d(a)(2)(A)]. The Lower Wakarusa River is designated for expected aquatic life support, primary contact recreation B, domestic water supply, food procurement, groundwater recharge, industrial water supply, irrigation and livestock watering. The Lower Wakarusa has a medium priority fecal coliform bacteria total maximum daily load (TMDL) established January 26, 2000. Baker Wetlands has a low dissolved oxygen TMDL established January 26, 2000.

Pursuant to Section 401 and KAR 28-16-28(c) the Kansas Department of Health and Environment finds this project will not result in a violation of Kansas Water Quality Standards and herewith issues a Water Quality Certification for construction and subsequent operation of the project subject to the following conditions:

1. The Kansas Department of Transportation shall avoid or control the discharge of suspended solids from the project so that the project does not cause:
 - a. Any surface waters of the state within and below the project area to contain discarded solid material, including trash, garbage rubbish, offal, grass clippings, discarded building or construction materials, car bodies, tires, wire and other unwanted or discarded materials [KAR 28-16-28e(b)(3)].
 - b. Any surface waters of the state within and below the project to have floating debris, scum, foam, froth and other floating materials directly or indirectly attributable to the project [KAR 28-16-28e(b)(4)].
 - c. Any surface waters of the state within or below the project to have deposits of sludge or fine solids [KAR 28-16-28e(b)(6)].
 - d. Alteration of the natural appearance of surface waters of the state within or below the project by the addition of color-producing or turbidity-producing substances of artificial origin [KAR 28-16-28e(b)(8)].
 - e. The concentration of dissolved oxygen in the Lower Wakarusa River and Baker Wetlands to be lower than 5.0 mg/L [KAR 28-16-28e(c)(2)(A)].
 - f. Addition of suspended solids to the Lower Wakarusa River or Baker Wetlands in amounts and concentrations that will interfere with the behavior, reproduction, physical habitat, or other factors related to the survival and propagation of aquatic or semiaquatic life or terrestrial wildlife [KAR 28-16-28e(c)(2)(D)].
2. The Kansas Department of Transportation shall avoid or control the discharge of toxic substances, oil and grease and other fluids from the project so that the project does not cause:

- a. Any surface waters of the state within and below the project area to have a public health hazard, nuisance condition or impairments of designed uses [KAR 28-16-28e(b)(1)].
 - b. Any surface waters of the state within and below the project area to have toxic substances, radioactive isotopes, and infectious microorganisms in concentrations or in combinations that jeopardize the public health or the survival or well-being of livestock, domestic animals, terrestrial wildlife or aquatic or semiaquatic life [KAR 28-16-28e(b)(2)].
 - c. Any surface waters of the state within and below the project area to have a visible oil and grease film or sheen on the water surface or on submerged substrate or adjoining shore lines, nor have a sludge or emulsion deposit below the water surface of adjoining shorelines [KAR 28-16-28e(b)(5)].
 - d. Any surface waters of the state within and below the project to contain taste and odor producing substances at concentrations which interfere with the production of potable water by conventional water treatment processes, impart an unpalatable flavor to edible aquatic or semiaquatic life or terrestrial wildlife or that result in noticeable odors in the vicinity [KAR 28-16-28e(b)(7)].
 - e. The concentration of dissolved oxygen in the Lower Wakarusa River or Baker Wetlands to be lower than 5.0 mg/L [KAR 28-16-28e(c)(2)(A)].
 - f. The pH of the Lower Wakarusa River or Baker Wetlands to be below 6.5 or above 8.5 [KAR 28-16-28e(c)(2)(C)].
 - g. Concentrations of toxic substances listed in Tables 1a, 1b, and 1c [KAR 28-16-28e(d)] in the Lower Wakarusa River or Baker Wetlands to exceed the criteria set out in these tables [KAR 28-16-28e(c)(2)(F) & KAR 28-16-28e(c)(4)(A)].
 - h. In the Lower Wakarusa River or Baker Wetlands, harmful concentrations of any substance alone or in combination with other substances causing toxic, carcinogenic, teratogenic, or mutagenic effects in humans [KAR 28-16-28e(c)(3)(C)].
 - i. Concentrations of substances that bioaccumulate in the tissues of edible organisms to exceed a cancer risk level of (10^{-6}) in persons consuming organisms taken from the Lower Wakarusa River or Baker Wetlands [KAR 28-16-28e(c)(4)(B)].
3. The Kansas Department of Transportation shall avoid or control the discharge of plant nutrients from the project so that the project does not cause:
- a. Accelerated succession or replacement of aquatic biota or the production of undesirable quantities or kinds of aquatic life in the Lower Wakarusa River or Baker Wetlands [KAR 28-16-28e(c)(2)(B)].

- b. Cause the development of objectionable concentrations of algae or algal by-products or nuisance growths of submersed, floating, emergent aquatic vegetation in the Lower Wakarusa River or Baker Wetlands [KAR 28-16-28e(c)(7)(A)].
4. The Kansas Department of Transportation shall avoid or control the discharge of *Escherichia-coli* bacteria from the project so that the project does not cause the *Escherichia-coli* bacteria concentration of the Lower Wakarusa River exceed a geometric mean of 262 organisms per 100 milliliters during the period of April through October 31 and geometric mean of 2,358 organisms per 100 milliliters during the period of November 1 through March 31. [KAR 28-16-28e(e)(c)(7)(D)].
5. The Kansas Department of Transportation shall prepare a written project water quality protection plan describing the actions that will be taken to comply with Certification Conditions 1, 2, 3 and 4. This plan shall be submitted to the Kansas Department of Health and Environment - Bureau of Water, Watershed Management Section, Curtis State Office Building, 1000 SW Jackson Street, Suite 420, Topeka, Kansas 66612. This condition may be waived depending on the content of the "stormwater pollution prevention plan" prepared pursuant to condition 6 below. The project water quality protection plan shall specifically address the following items:
 - a. **Riparian Areas** Minimize removal or disturbance of riparian areas (areas adjacent to water bodies). KDHE encourages the use of vegetation consistent with adjoining vegetation materials to minimize impacts from improper handling of fertilizers and pesticides.
 - b. **Solid Waste** All waste materials produced by the construction project shall be disposed of in accordance with the provisions of the Kansas solid waste management statutes and regulations (K.S.A. 65-3401 and K.A.R. 28-29-1 et. seq.) or applicable local rules. Good house keeping including personal refuse such as food containers, sacks etc. shall be addressed.
 - c. **Fuels, Chemicals and Maintenance Areas** All fuels and chemicals necessary to complete the project shall be stored in such a manner that accidental spillage is minimized or can be temporarily contained before reaching the water body. Equipment maintenance areas shall also be located in this manner.
 - d. **Spills** Should a spill of fuel or discharge of pollutants occur, the local emergency staff should be contacted **first** by dialing 911. The Kansas Department of Health and Environment shall then be notified immediately: **(785)- 296-1679 (24 hours a day.)** These incidences should also be reported to the National Spill Response Center (1-800-424-8802). *Hazardous materials spills and air releases that meet federal reportable quantities must also be reported to Kansas Division of Emergency Management (800-275-0297).* **These reporting numbers shall be posted in several locations around the site. A Spill Prevention and Response Plan should be prepared.**

- e. **Floating Debris** The applicant shall take appropriate measures to capture any floating debris released to surface waters as a result of this project.
 - f. **Stormwater Conveyance** Runoff from the roadway shall not be discharged to Baker Wetlands but discharged to the Lower Wakarusa River. Stormwater conveyance structures and measures shall be designed to serve as water quality protection measures for the Lower Wakarusa River. Mechanisms such as grass-lined channels, velocity reducers, detention and retention structures and filtration/infiltration areas, including stabilized outfall structures shall be considered.
6. This project is subject to the National Pollutant Discharge Elimination System (NPDES) stormwater permit requirements of 40 C.F.R. 122.26. This certification does not relieve the obligation of the Kansas Department of Transportation to secure such permit. Information on construction site NPDES permits is available from Bureau of Water - Industrial Programs website: www.kdhe.ks.us/stormwater or Mr. Alan Brooks at 785/296-5549.
7. This certification does not relieve the Kansas Department of Transportation of the responsibility for any discharge into waters of the state. The Kansas Department of Health and Environment retains the option of revoking this certification any time an inappropriate discharge may occur. As provided by KSA 65-171(f), failure to comply with the conditions of this certification may subject the responsible party to fines up to \$ 10,000 per violation with each day the violation occurs constituting a separate violation.
8. If the applicant believes the conditions of this certification will result in impairment of important social and economic development, the applicant is advised of the variance provisions of KAR 28-16-28b(jjj) and KAR 28-16-28f(e).

Questions concerning this certification may be directed to Mr. Scott Satterthwaite, 785-296-5573.

Sincerely,



Donald D. Snethen P.E.
Chief, Watershed Management Section
Bureau of Water

pc: Julie Coleman, KDHE DEA Northeast District Office

Be a clean water neighbor.